

-----Original Message-----

From: Clauson, Karen L.
Sent: Wednesday, September 17, 2003 12:03 PM
To: Wagner, Kim K.; Goldberg, Tobe L.
Subject: FW: Pending matters against Qwest

-----Original Message-----

From: Clauson, Karen L.
Sent: Tuesday, September 16, 2003 9:47 AM
To: 'Jodi.Smith@usdoj.gov'
Subject: Pending matters against Qwest

Enclosed is a document that Eschelon filed with the AZ Commission on 9/8/03, listing pending and recently decided matters against Qwest.



Pendingmatters.doc

Karen L. Clauson
Senior Director of Interconnection
Eschelon Telecom, Inc.
730 2nd Ave. South, Suite 1200
Minneapolis, MN 55402
Phone: 612-436-6026
Fax: 612-436-6126

PENDING/RECENTLY DECIDED MATTERS

-----Original Message-----

From: Clauson, Karen L.
Sent: Tuesday, September 02, 2003 5:50 PM
To: 'TBERG@FCLAW.com'
Subject: FW: matters in other states/supplementing record

We have been told that Andy may be out of the office, so we are forwarding to you on behalf of Qwest.

-----Original Message-----

From: Clauson, Karen L.
Sent: Tuesday, September 02, 2003 5:38 PM
To: 'Crain, Andrew D'
Cc: Maureen Scott; dpozefsky@azruco.com; rhip@bellatlantic.net; hagoondb@bellsouth.net; MJR@CC.STATE.AZ.US; RLB@CC.STATE.AZ.US; thc@lrlaw.com; jsburke@omlaw.com; mpatten@rhd-law.com; jcrockett@swlaw.com; thomas.f.dixon@wcom.com; 'Wolters, Richard S (Rick) - LGCRP'; 'Watkins, Gene'
Subject: matters in other states/supplementing record

Andy:

Eschelon noticed the following exchange in the Transcript from the AZ 271 open meeting held on August 21, 2003:

Commissioner Mundell: "Are there matters pending in any other commissions in the other 13 states?" (Tr. p. 43, lines 17-19)

Mr. Crain: "We're well aware that that will continue in the future, and other than this DS1 issue, I don't know of anything else that has been filed with those commissions." (Tr. p. 44, lines 13-15)

Commissioner Mundell: "Once you have a chance to go back to your office and think about it, if you want to supplement your statement, that will be fine." (Tr. p. 44, lines 17-19)

As part of supplementing the record as to other matters pending in other commissions, perhaps Qwest would consider the following matters. (Some enclosures/URLs are provided as a convenience, though Qwest should have complete info/status):

MN Docket No. P-421/C-03-683 (Eschelon Complaint re. Qwest's Refusal to Honor Contractual and Legal Obligations)



Complaint MN
DMOQ.doc



Complaint --
Markert Aff -- 5-...

MN Docket No. P-421/C-03-627 (Eschelon Complaint re. EEL issue and McLeod opt-in) [Letters of intent to file similar complaints have been filed in WA and CO. AZ complaint will also be filed soon.]



AGO_DOCS-#8967
00-v1-Eschelon_Q...



Qwest complaint
final.doc

WA Federal Court (Western District) Docket No. C03-1296R (Eschelon Complaint re. access charges/missing access records in AZ, CO, MN, OR, UT, and WA, DSL, and failure to provide automatic conversion)



430082.2.doc

MN Docket No. P421/C-02-1439 (McLeod/Prairie Wave Complaint Against Qwest for failure to pay Switched Access Charges)

<http://www.puc.state.mn.us/docs/orders/02-138.pdf>

MN Docket No. P-421/C-03-616 (Eschelon Request for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures)



03-0091.url



DrHaarltrApr1803.doc

Eschelon letter to Qwest regarding CO and MN outages/potential sabotage



TTaylor Outage
aug03.doc



Denver BDFB
Pics.ppt

MN Docket No. P421/C-03-1024 (Velocity Telephone Complaint against Qwest re. Qwest's Anti-Competitive Conduct - improperly failing to provision dark fiber, improperly refusing to provide interconnection, and improperly refusing to provide meet point transport at parity with Qwest's interoffice transport)

<http://www.puc.state.mn.us/docs/orders/03-0085.pdf>

MN Docket No. P-421/C-03-1024 (Desktop Media Complaint Against Qwest)

<http://www.puc.state.mn.us/docs/orders/03-0085.pdf>

OR Order Nos. 03-462 & 03-269 (Metro One Telecom Complaint Against Qwest for breaching interconnection agreement; Commission found Qwest must provide access to UNEs at cost-based rates, including the UNE Directory Assistance listings (DAL))

<http://www.puc.state.or.us/orders/2003ords/03%2D462.pdf>

NE Nos. FC-1296 & FC-1297 (Cox Nebraska Telecom, ALLTEL, Illuminet Against Qwest re. SS7)

ID Docket No. QWE-T-02-11 (Idaho Telephone Association, Citizens, CenturyTel, Potlatch and Illuminet Complaint Against Qwest re. SS7)

<http://www.puc.state.id.us/fileroom/telecom/qwe-t-02-11/qwe-t-02-11.pdf>

IA Docket No. FCU-03-24 (U.S. Cellular, Cox Iowa Telecom, and Illuminet Complaint Against Qwest re. SS7)

FCC, 8/4/03 Letter by Mountain Telecommunications to FCC Requesting involvement of Enforcement Bureau with resolution of dispute re. SS7.

MCI 8/26/03 Letter to AZ commission re. OSS issues



tom's
stationery.doc

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Fax: 612-436-6126

-----Original Message-----

From: Clauson, Karen L.
Sent: Sunday, September 07, 2003 12:27 PM
To: 'ewoodcock@perkinscoie.com'
Subject: 2 additional matters

In addition to the matters listed in my earlier email, here are two more:

Multi-state arbitration & related court case regarding arbitration procedure (New Access Complaints regarding winback/wholesale pricing, credits, including MN finding relating to access/DUF files) (AAA arb. No 77 Y 181 00316 VSS, CO Dist Ct. No. 03-N-1278

SD Docket No. T02-0389 (McLeod/Prairie Wave Complaint Against Qwest for failure to pay Switched Access Charges)

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Fax: 612-436-6126

-----Original Message-----

From: Clauson, Karen L.
Sent: Saturday, September 06, 2003 9:29 AM
To: 'ewoodcock@perkinscoie.com'
Cc: 'Maureen Scott'; 'dpozefsky@azruco.com'; 'rhip@bellatlantic.net'; 'hagoodb@bellsouth.net'; 'MJR@CC.STATE.AZ.US'; 'RLB@CC.STATE.AZ.US'; 'thc@lrlaw.com'; 'jsburke@omlaw.com'; 'mpatten@rhd-law.com'; 'jcrockett@swlaw.com'; 'thomas.f.dixon@wcom.com'; 'Wolters, Richard S (Rick) - LGCRP'; 'Watkins, Gene'; 'TBERG@FCLAW.com'
Subject: FW: matters in other states/supplementing record

Beth:

Mr. Berg has not responded to the emails below. We would appreciate it if you could provide a response.

-----Original Message-----

From: Clauson, Karen L.
Sent: Wednesday, September 03, 2003 4:32 PM

To: 'Crain, Andrew D'; 'TBERG@FCLAW.com'
Cc: 'Maureen Scott'; 'dpozefsky@azruco.com'; 'rhip@bellatlantic.net'; 'hagoodb@bellsouth.net';
'MJR@CC.STATE.AZ.US'; 'RLB@CC.STATE.AZ.US'; 'thc@lrlaw.com'; 'jsburke@omlaw.com';
'mpatten@rhd-law.com'; 'jcrockett@swlaw.com'; 'thomas.f.dixon@wcom.com'; 'Wolters, Richard S
(Rick) - LGCRP'; 'Watkins, Gene'
Subject: RE: matters in other states/supplementing record

Andy/Tim:

Are you supplementing the record with these (and any other) matters? It would be helpful to know before the open meeting on Friday. If you mail by regular mail, I may not get it before then, so was wondering if you could let me know. Thanks.

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendrayner
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

In the matter of the Complaint of Eschelon)
Telecom of Minnesota, Inc. against Qwest)
Corporation, formerly known as U S West)
Communications, Inc.)
)
)
)

Docket No. P_____

**COMPLAINT AGAINST QWEST
CORPORATION, AND REQUEST
FOR EXPEDITED PROCEEDING
PURSUANT TO MINN. STAT. 237.462**

Eschelon Telecom of Minnesota, Inc. ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1. Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual and legal obligations to Eschelon, thereby injuring Eschelon, Minnesota consumers, and the development of a competitive telecommunications marketplace in Minnesota. Eschelon's Complaint alleges significant overcharges by Qwest for collocation non-recurring rates, and Qwest's withholding of DMOQ billing credits from Eschelon.

2. Specifically, Qwest overcharged Eschelon for non-recurring rates for 40 amp feeds and space preparation fees when Eschelon built its collocations in Minnesota in 1999 and 2000. Eschelon is due a refund of \$425,959, plus interest, from Qwest, which Qwest has refused to pay. In addition, Qwest has refused to provide Eschelon with all of the DMOQ billing credits due under the Parties' February 2000 Stipulation and Agreement and August 25, 1999 Interconnection Agreement. Eschelon is due \$105,048, plus interest, in DMOQ billing credits from Qwest related to UNE-E billing inaccuracies from March 2002 through December 2002.

3. Due to the continuous nature of Qwest's violations of law related to these issues, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6.

4. Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by the Commission pursuant to Minn. Stat. § 237.081, Subd. 1(a); the issuance of an administrative penalty order by the Commission pursuant to Minn. Stat. § 237.462, Subds. 1 and 2; the issuance of an Order requiring Qwest to refund \$425,959, plus interest, in collocation overcharges; the issuance of an Order requiring Qwest to refund \$105,048, plus interest, in DMOQ billing credits for March through December 2002; the issuance of an Order requiring Qwest to include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates; and such other relief as the Commission deems appropriate.¹

5. Eschelon is a competitive local exchange carrier ("CLEC") providing local and interexchange telecommunications services in Qwest's service territory in Minnesota, primarily serving small business customers.

6. Eschelon's principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402. Eschelon is certified to provide local exchange service in Minnesota pursuant to Orders of the MPUC, dated July 18, 1996 and April 12, 1999.

7. Eschelon is represented in this proceeding by its attorney:

Brent Vanderlinden, Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
Telephone: (612) 436-6287
Facsimile: (612) 436-6387

8. Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier ("ILEC") within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the "Act"), and provides

¹ Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

local exchange, exchange access and inter-exchange services in Minnesota subject to the Commission's regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota.

9. Eschelon has served Qwest with this Complaint through:

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402
Telephone: (612) 672-8904
Facsimile: (612) 672-8911

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Qwest Communications Director
Inter-Connection Compliance
1801 California St., Room 2410
Denver, Colorado 80202

JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 252(e) (authority of state commissions to enforce interconnection agreements), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, Subds. 1 and 6 (competitive enforcement), the Agreement for Local Wireline Network Interconnection and Service Resale between Eschelon and Qwest, § 11.1 and the Stipulation and Agreement of the parties, Section F.

FACTUAL BACKGROUND

A. ESCHOLON IS ENTITLED TO A REFUND OF \$425,959, PLUS INTEREST, FROM QWEST FOR NON-RECURRING COLLOCATION OVERCHARGES IN 1999 AND 2000.

1. On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Eschelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement and Amendments are attached as exhibits.²

2. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. Exhibit A-1, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such

dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

3. The Agreement includes a table for “Physical and Virtual Collocation Prices” which states that “Rates are interim and subject to true up based on further Commission proceedings.” Exhibit A-2.

4. On January 24, 2000, Qwest and Eschelon entered into the Second Amendment to their Interconnection Agreement. Exhibit A-3. The Amendment was filed with the Commission on January 27, 2000. The Amendment replaced the collocation terms and pricing in the Agreement with amended collocation terms and pricing. *Id.*, page 1. The Amendment reiterated the “interim/subject to true up” nature of the collocation rates with the following language:

USW will recover MPUC approved Collocation costs through both recurring and nonrecurring charges. . . . All costs will be those costs and cost elements approved by the MPUC To the extent that a rate element or rate is not allowed under the current MPUC rulings or in any MPUC Cost Order, the MPUC’s determination will govern.

Id., Section 6.1.

5. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) \$397,557 in non-recurring charges for 40 amp power delivery. Exhibit A-4. Qwest’s charges were not based on Commission approved rates.

6. In its May 3, 1999, Order Resolving Cost Methodology, Requiring Compliance Filing, and Initiating Deaveraging Proceeding [Generic Cost Case], the Commission clearly stated that collocation

² All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.

prices are to be set following the AT&T/MCI collocation cost model (CCM).³ Therefore, Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed only \$11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs. Exhibit A-4. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$385,839, plus interest. *Id.*

7. Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) \$41,804 in space preparation fees. Exhibit A-5. Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed only \$1,684. *Id.* Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$40,120, plus interest. *Id.*

8. In Docket No. P-421/C-01-1896, the Commission ordered Qwest to issue a refund of non-recurring collocation overcharges to Onvoy Inc., including 40 amp feeds and cageless collocation space preparation fees, plus 6% simple interest on the refund. Eschelon is seeking a refund in this Complaint based on the same rationale that Onvoy was awarded a refund. Therefore, Eschelon requests 6% simple interest on its refunds.

9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Exhibit A-6. Qwest denied the request in a letter from Ms. Engels, dated April 1, 2003. Exhibit A-7. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy. To date, Qwest has not responded to or acted on these overcharges.

10. Qwest denied Eschelon's refund requests for non-recurring collocation overcharges based on a settlement agreement⁴ between the parties, stating, "The settlement agreement between Qwest and Eschelon, dated April 2, 2001, settles fully all claims related to collocation non-recurring charges

³ The exceptions – Fiber Splicing; Essential AC Power; Essential AC Power Feed; and Composite Clock – which the Commission authorized US West to price using US West's cost model, in a later order issued on March 15, 2000, are inapplicable in this case.

⁴ The "Confidential Second Amendment to Confidential/Trade Secret Stipulation," attached hereto as Exhibit A-8, is now a public document.

billed prior to March 1, 2001.” Exhibit A-7 at 9. However, this statement is incorrect with respect to Eschelon’s request for a refund of overcharges for 40 amp feeds and space preparation fees.⁵

11. The settlement resolved five categories of claims, the second of which addressed collocation charges. Exhibit A-8. Eschelon agreed to release Qwest from:

any claims that [Eschelon] can or could have brought against Qwest related to the following: . . . (b) for all periods prior to March 1, 2001, true-ups pursuant to decisions of the Minnesota Public Utilities Commission in Minnesota docket number P-442, 5321, 3167, 466, 421/CI-96-1540, including for collocation and unbundled network elements . . .

Id. at 1-2. This language limited the settlement’s coverage to collocation components that were explicitly priced in the Generic Cost Case.

12. Non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case. In fact, in the Onvoy case, Qwest *expressly acknowledged* that non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case. Exhibit A-9 at 8 ¶27, 10 ¶38 & fn 31, and 16 ¶62. Therefore, there is no legal or factual basis for Qwest’s ongoing refusal to refund to Eschelon \$425,959, plus interest, for collocation overcharges

B. ESCHELON IS ENTITLED TO \$105,048, PLUS INTEREST, IN DMOQ BILLING CREDITS FROM QWEST FOR UNE-E BILLING INACCURACIES FROM MARCH 2002 THROUGH DECEMBER 2002.

1. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for, among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Exhibit B-1.

2. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000. Exhibit B-2. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties’ Interconnection Agreement.

3. The Stipulation provides for three metrics to be measured each month: (1) provisioning commitments met, (2) time to restore-out of service and (3) billing accuracy – adjustments for errors.

⁵ Eschelon agrees that its refund request for collocation non-recurring charges for 20 amp feeds was

Each of the three DMOQs is assigned a Performance Index Rating based on the level of compliance achieved by Qwest. The Performance Index Rating is then converted to a numerical value and an overall Performance Index is calculated on a monthly basis. Exhibit B-1 at 12-13, Exhibit B-2 at 3. If the overall Performance Index for the month is a negative number, this indicates that Qwest's overall performance for the month is less than the required objective; in which case the Performance Index is used as a percentage discount against the previous month's total bill from Qwest to determine the credit due to Eschelon. Exhibit B-2 at 3. The Stipulation requires Qwest to pay Eschelon's undisputed Overall Performance Credit claims within 30 days of submission by Eschelon.

4. Eschelon submitted claims to Qwest for performance billing credits for the months of March through June, 2002. Exhibit B-3. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon. After disputing these claims with Qwest for several months,⁶ with no success, Eschelon submitted claims to Qwest for performance billing credits for the remainder of 2002. Exhibit B-3. In response, Qwest agreed to provide Eschelon with \$52,702 in undisputed DMOQ credits, but refused to include an entire category of billing errors in this calculation, namely UNE-Eschelon ("UNE-E") bill credits. Exhibit B-5. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals \$105,048. Exhibit B-3.

5. The primary dispute concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.

6. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Exhibit B-6. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as

resolved in the settlement agreement.

⁶ The parties' exchange of correspondence concerning DMOQ credits is attached as Exhibit B-4.

UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform (“UNE-P”), Qwest’s official platform product.⁷

7. Qwest agreed to convert Eschelon’s resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest’s promises to develop a billing system to accurately bill Eschelon for UNE-E lines.

8. Qwest’s continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment.⁸ Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered.

9. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest’s UNE-E bills to Eschelon were inaccurate in 2002. This particular concern was raised by Eschelon in two recent regulatory proceedings. In the Minnesota Public Utilities Commission’s investigation of Qwest’s 271 filing, the Administrative Law Judge found “conclusively that UNE-Star does not meet the standards for a UNE-P offering (particularly with respect to billing accuracy . . .).” MN PUC Docket No. P-421/CI-01-1371, ALJ’s Report at 35, ¶ 100. Exhibit B-3. Likewise, in the Arizona Commerce Commission’s investigation of Qwest’s 271 filing, the ACC staff recommended that “Until the

⁷ When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and changing processes and customer-affecting service problems. The problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

⁸ Bills for months prior to March 2002 contained this same error. However, Eschelon had entered into an agreement with Qwest to forego DMOQ sums due for those months.

issue with embedded accounts is resolved, Qwest should be required to count [UNE-E billing] as an error or an inaccurate bill for purposes of calculating its billing measurements. ACC Docket No. T-00000A-97-0238, Staff Report at 47, ¶ 216. Exhibit B-3.

10. Despite the fact Qwest admits its UNE-E bills to Eschelon are inaccurate, it refuses to include these bills in the billing accuracy metric agreed upon by the parties. Qwest alleges that “Qwest and Eschelon have agreed upon the process for the migration of accounts over to UNE-P and were fully aware of the timeframe for the conversion process.” Letter from Vicki Keller to David Frame, dated August 20, 2002. Exhibit B-4. Qwest has stated that it will not include UNE-E billing inaccuracies in the DMOQ credit calculation because it does not believe the UNE-E rate is being billed in error. *Id.* Qwest stated on November 14, 2002, and reiterated on April 1, 2003, that “Qwest will litigate this issue if necessary.” Exhibit B-4, Exhibit A-7 at 10.

11. Qwest has a duty to provide Eschelon with accurate UNE-E bills, regardless of whether UNE-E lines are eventually converted to UNE-P lines. The UNE-E Amendment expressly provides that it “may not be further amended or altered except by written instrument executed by an authorized representative of both Parties.” Exhibit B-6 at 2 ¶1.8. The UNE-E Amendment also expressly provides that, except as modified by the amendment, the underlying interconnection agreement “shall remain in full force and effect.” *Id.* The UNE-E Amendment does not modify the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest. Exhibit B-1 at ¶12. The parties have not entered into a subsequent amendment that modifies the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest. Therefore, Qwest’s past and on-going UNE-E billing inaccuracies are justly addressed through the payment of DMOQ credits to Eschelon.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THESE ISSUES BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1. As has been demonstrated above, Eschelon has initiated numerous contacts with Qwest in an attempt to address the issues raised in this Complaint.

2. In a February 10, 2003, letter from Eschelon President Richard Smith to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest, Eschelon reiterated its requests for the collocation refund and DMOQ credits. Exhibit A-6. Qwest denied Eschelon's requests on April 1, 2003. Exhibit A-7.

QWEST'S CONTINUING VIOLATIONS OF LAW

Qwest's refusal to refund collocation overcharges and DMOQ credits causes significant harm to Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota. Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are impeded due to Qwest unreasonably withholding these refunds and credits from Eschelon.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law.

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law. Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders. Qwest's breaches of the Interconnection Agreement violate federal law, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

REQUEST FOR EXPEDITED HEARING

1. The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit A-1 at 14, ¶11.1. Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission

for resolution. *Id.* The Agreement further provides that the Parties agree to seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

2. The Interconnection Agreement provisions in this regard are consistent with Minn. Stat. § 237.462, Subd. 6. That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest. In making this determination, the Commission may consider “any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element.” *Id.*

3. Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint continue without abatement, with significant harm to Eschelon. In particular, the DMOQs should act as an incentive to Qwest to provide accurate bills as required by the Parties’ Interconnection Agreement. But, if Qwest can provide inaccurate bills with no consequence under the DMOQs, it is unlikely to fix this billing problem or future billing problems. Meanwhile, Eschelon continues to receive inaccurate bills that require significant resources to reconcile each month and always remain an estimate of what is actually due.

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission:

1. Investigate the issues raised in this Complaint pursuant to Minn. Stat. § 237.081, Subd. 1;
2. Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn. Stat. § 237.462, Subd. 6;
3. Declare that the actions of Qwest detailed above constitute repeated and continuing violations of its Interconnection Agreement with Eschelon;
4. Order Qwest to immediately refund to Eschelon the overcharges for collocation non-recurring 40 amp feeds and space preparation fees, with interest;
5. Order that Qwest include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates, as required by the Parties’ Stipulation and Interconnection Agreement;

6. Order Qwest to immediately credit to Eschelon all amounts due for DMOQ credits for the months of March 2002 through the present, with interest;
7. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract;
8. Assess administrative penalties against Qwest for its repeated and continuing violations of state and federal law and the Interconnection Agreement, as authorized by Minn. Stat. § 237.462, Subd. 1; and
9. Grant Eschelon such other and further relief as the Commission deems appropriate.

Dated: May 2, 2003

Respectfully submitted,

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**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendrayner
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

Eschelon Telecom of Minnesota, Inc.)

Docket No. P _____

Complainant,)

vs.)

**AFFIDAVIT OF
WILLIAM D. MARKERT**

Qwest Corporation,)

Respondent.)

STATE OF MINNESOTA)

) ss.

COUNTY OF HENNEPIN)

1. I, William D. Markert, being duly sworn, state that I am the Vice President-Network Financial Management for Eschelon Telecom, Inc. (Eschelon).
2. Eschelon and Qwest are parties to an Interconnection Agreement. Attached as Exhibit A-1 is a true and correct copy of excerpts from the Parties' Agreement for Local Wireline Network Interconnection and Service Resale (Interconnection Agreement or Agreement).
3. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission.
4. The Agreement includes a table for "Physical and Virtual Collocation Prices" which states that "Rates are interim and subject to true up based on further Commission proceedings." Attached as Exhibit A-2 is a true and correct copy of the table.

5. On January 24, 2000, Qwest and Eschelon entered into the Second Amendment to their Interconnection Agreement. Attached as Exhibit A-3 is a true and correct copy of the Amendment. The Amendment was filed with the Commission on January 27, 2000.

6. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) approximately \$397,557 in non-recurring charges for 40 amp power delivery. Attached as Exhibit A-4 is a true and correct copy of my letter to Jean Novak, dated January 31, 2003, detailing these charges. Qwest's charges were not based on Commission approved rates.
7. Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed approximately \$11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$385,839, plus interest.
8. Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) approximately \$41,804 in space preparation fees. Attached as Exhibit A-5 is a true and correct copy of my spreadsheet detailing these charges. Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed approximately \$1,684. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$40,120, plus interest.
9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Attached as Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Attached as Exhibit A-6 is a true and correct copy of that letter. Qwest denied the request in a letter from Ms. Engels, dated April 1, 2003. Attached as Exhibit A-7 is a true and correct copy of that letter.
10. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy. To date, Qwest has not responded to or acted on these overcharges.
11. Attached as Exhibit A-8 is a true and correct copy of the "Confidential Second Amendment to Confidential/Trade Secret Stipulation" between Qwest and Eschelon, which is now a public document.
12. Attached as Exhibit A-9 is a true and correct copy of relevant portions of the ALJ's Report in the Onvoy case, MPUC Docket No. P-421/C-01-1896.
13. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for,

among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Attached as Exhibit B-1 is a true and correct copy of relevant portions of the Agreement.

14. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000. Attached as Exhibit B-2 is a true and correct copy the Stipulation. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties' Interconnection Agreement.
15. Eschelon submitted claims to Qwest for DMOQ credits for the months of March through June, 2002. Attached as Exhibit B-3 is a true and correct copy of my letter (including attachments) to Jean Novak, dated March 13, 2003, detailing Eschelon's DMOQ credit requests from March 2002 through December 2002. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon.
16. Attached as Exhibit B-4 is a true and correct copy of Qwest's and Eschelon's exchange of correspondence concerning DMOQ credits.
17. Qwest agreed to provide Eschelon with \$52,702 in undisputed DMOQ credits, but refused to include DMOQ credits related to UNE-Eschelon ("UNE-E") billing errors. Attached as Exhibit B-5 is a true and correct copy of Qwest's March 28, 2003 letter (including attachments) detailing the DMOQ credits provided. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals approximately \$105,048.
18. The primary dispute between Eschelon and Qwest regarding DMOQ credits concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.
19. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Attached as Exhibit B-6 is a true and correct copy of this Amendment. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform ("UNE-P"), Qwest's official platform product.
20. When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and changing processes and customer-affecting service problems. The

problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

21. Qwest agreed to convert Eschelon's resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest's promises to develop a billing system to accurately bill Eschelon for UNE-E lines.
22. Qwest's continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment. Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest's UNE-E bills to Eschelon were inaccurate in 2002.

FURTHER AFFIANT SAYETH NOT.

Dated: May 2, 2003.

William D. Markert

Subscribed and sworn to before me
this _____ day of May 2003.

Notary Public

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square Suite 1700
100 Washington Avenue South
Minneapolis, MN 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

LeRoy Koppendrayner
R. Marshall Johnson
Gregory Scott
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of
Eschelon Telecom of Minnesota, Inc.
Against Qwest Corporation.

OAH Docket No. 15-2500-15426-2
MPUC Docket No. P-421/C-03-627

**DEPARTMENT OF COMMERCE RESPONSE TO QWEST
CORPORATION'S MOTION FOR SUMMARY JUDGMENT
REGARDING ESCHELON'S OPT-IN CLAIM AND RESPONSE TO
ESCHELON'S INITIAL BRIEF**

I. INTRODUCTION

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a formal Complaint claiming that Eschelon is entitled to the same rate from Qwest for a service known as UNE-Star⁹ as that paid by one of its competitors, McLeodUSA (McLeod); that Eschelon is entitled to receive nondiscriminatory rates from Qwest.

Qwest maintains that it never refused to amend Eschelon's pricing, but that in order for Eschelon to obtain McLeod's pricing, Eschelon must agree to the same terms and conditions as McLeod, including the volume commitments and the termination date.

Qwest asserts that what Eschelon proposes is not an "opt-in" but rather a negotiation and that Eschelon does not have a right to opt-in to McLeod's pricing without addressing the other differences between the Eschelon and McLeod Interconnection Agreement (ICA), while Eschelon argues that it is

⁹ The service at issue is known as UNE-E when applied to Eschelon, UNE-M when applied to McLeod or generically as UNE-Star. UNE-Star is the general term also used by the Department to refer to both UNE-M and UNE-E.

entitled to the same price for UNE-Star as McLeod and it need not make other changes to its Agreement to obtain that rate, because any differences in the two agreements are not legitimately related to the rate.

Qwest expressed a willingness to negotiate an amendment to address Eschelon's pricing request and provided a Qwest contact for engaging in such negotiations, but Eschelon has been unwilling to negotiate to obtain the McLeodUSA pricing, maintaining that it was entitled to the pricing despite the other terms of the agreement.¹⁰ Qwest maintains that it never refused to amend Eschelon's pricing, but has made it clear that it is unwilling to give Eschelon McLeod's pricing unless Eschelon agree to make other changes to its UNE-Star agreement.¹¹

Qwest challenges the jurisdiction of the Commission to address any of the issues raised by Eschelon in this Complaint and further asserts that the Commission is without any authority to award damages to Eschelon in this case.

As discussed in further detail below, the Department recommends that the ALJ find that:

1. The Commission has jurisdiction to resolve Eschelon's Complaint.
2. Qwest was required to provide Eschelon with the reduced pricing on the UNE-Star product, and that Eschelon was not required to negotiate an amendment to its ICA.
3. Eschelon is entitled to the reduced rate for the remainder of the term of the McLeod Amendment or for so long as McLeod benefits from that rate, whichever is longer.
4. The Commission has authority to issue an order to correct Qwest's discriminatory treatment of Eschelon, including retroactive monetary relief.

II. STATEMENT OF FACTS

The material facts are not in dispute:¹²

¹⁰ Eschelon Complaint, Ex. B-6, at 7; Eschelon Complaint, Ex. B-5, at 5.

¹¹ See Ex. 3 to Eschelon's Initial Brief (November 8, 2002 letter to Eschelon from Qwest stating that to obtain McLeod's UNE-Star rate Eschelon must agree to the same terms and conditions as McLeod, including the volume commitments and the termination date).

¹² Qwest has filed a Motion for Summary Judgment and asked for treatment pursuant to OAH Rule 1400.5500(K), which provides that the Office of Administrative Hearings is empowered to "recommend a summary disposition in a case or any part thereof where there is no dispute as to any issue of fact . . ." Eschelon in its Initial Brief also argues that it is entitled to relief based on the undisputed facts in the record. Because the facts material to this issue are for the most part not in dispute, summary disposition would be appropriate.

1. Eschelon and Qwest entered into an Interconnection Agreement (Agreement or Interconnection Agreement or ICA) that was approved by the Commission on October 4, 1999. (Docket No. P-5340, 421/M-99-1223). *See* Exhibit A to Complaint. That Agreement was premised on the original arbitrated AT&T/US WEST Agreement.

2. On October 1, 2000, Qwest and McLeodUSA entered into the Eighth Amendment to their Interconnection Agreement. Exhibit A-2 to Complaint. That Amendment was not filed with the Commission, and thus not made public until December 20, 2000. It was approved by the Commission in Docket P5323,421/IC-00-1707, on January 26, 2001. That Amendment provided for UNE-M or UNE-Star at the recurring rates listed in Attachment 3.2 to that Amendment. The Platform recurring rate for Minnesota was \$27.00

3. On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their Interconnection Agreement (UNE-Star Amendment). Exhibit A-3 to Complaint. The Amendment was approved by the Commission on January 26, 2001 in Docket No. P5340,421/IC-00-1657. This Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The Platform Recurring rate for Minnesota was \$27.00.

4. The rates were the same as the rates in the McLeodUSA UNE-Star Amendment even though the termination dates and the volumes differed greatly between the two agreements. Pursuant to the terms of the McLeod USA Amendment, McLeodUSA pricing expires on December 31, 2003.¹³ Eschelon requests that it receive pricing until December 31, 2005, the expiration date of its agreement with Qwest.¹⁴

5. On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement. This document amended the pricing of UNE-Star for McLeodUSA.¹⁵ The Amendment provided for a reduction of UNE-Star rates in Minnesota from \$27.00 per month to \$24.50 per month for McLeod. That Amendment was approved by Commission Order dated February 7, 2003, in Docket No. P-5323,421/IC-02-1566.

6. Immediately after learning of this amendment, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeodUSA. In making its request, Eschelon requested the

¹³ *See* Complaint, Ex. A-5 at 2

¹⁴ *See* Complaint, Ex. A-3, at 1

price contained in the agreement without any corresponding provisions.¹⁶ Qwest has repeatedly refused to do so unless Eschelon agrees to the other terms and conditions of the Qwest/McLeodUSA Amendment.¹⁷

7. Qwest expressed a willingness to negotiate an amendment to address Eschelon's pricing request and provided a Qwest contact for engaging in such negotiations.¹⁸ Eschelon was unwilling to negotiate to obtain the McLeodUSA pricing, absent an agreement by Qwest to waive other terms of the agreement, including the expiration of the pricing agreement and the volume commitments contained in the agreement.¹⁹

III. ARGUMENT

A. Jurisdiction

Qwest maintains that the Minnesota Public Utilities Commission lacks jurisdiction to hear this dispute--that "Eschelon has not sought to opt-into the McLeod agreement without modifying its terms" and thus neither the Act nor the FCC's rules provide the Minnesota Commission with jurisdiction.²⁰ The Department agrees with Eschelon that this claim necessarily fails. The very issue for the Commission to decide is what additional terms, if any, are legitimately related to the rate paid by McLeod. The FCC has made it clear that it is the state commissions that should examine the issue in the first instance. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order), ¶1321. There, the FCC stated in relevant part:

Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.²¹

Moreover, the Commission has express authority to enforce the ICA, which includes whether Qwest has violated Eschelon's right to its so-called "most favored nation" provision. Under Eschelon's Interconnection Agreement, Qwest must provide network elements to Eschelon on rates, terms and

¹⁵ See Complaint, Ex. A-5.

¹⁶ See Eschelon Complaint, Ex. B-5, at 5

¹⁷ See Corbetta Letter, Ex. 3 to Eschelon's Initial Brief; Engels Letter, Ex. B-6 to Complaint.

¹⁸ See Eschelon Complaint, Ex. B-6 at 7

¹⁹ See Eschelon Complaint, ¶ 9

²⁰ See Qwest Answer at 11.

²¹ *Id.* at ¶ 1321

conditions no less favorable than those provided to itself or any other party.²² The Commission clearly has jurisdiction to address an alleged breach of an ICA.²³

In either event, the Commission has explicit jurisdiction over the issues presented in these proceedings.

B. Eschelon is Entitled to the Same Reduction in Price as McLeod Received for UNE-Star.

Eschelon is entitled to the same price reduction for UNE-Star as that provided to McLeodUSA. Pursuant to Section 251 of the Act, interconnection and unbundled element rates provided by an ILEC must be nondiscriminatory. The Act provides methods for CLECs to take advantage of their right to nondiscriminatory rates. One avenue is to allow CLECs to "pick and choose" provisions from the interconnection agreements of other CLECs as provided in Section 252(i) of the Act. The FCC made it clear that the Act's nondiscrimination provisions apply to an ILEC's attempts to restrict availability of provisions under section 252(i). First Report and Order, ¶ 1315.

Section 252(i) of the Act states:

"a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."²⁴

The FCC promulgated a rule to implement 252 (i)--47 CFR § 51.809 (1997).²⁵ In its Order implementing its rule, the FCC has stated that section 252(i) is "a primary tool of the 1996 Act for preventing discrimination under section 251."²⁶ Rule 51.809 provides, in relevant part:

"An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection,

²² See Part A, Part III, Sec. 37, pp. 28-29 of the Eschelon Interconnection Agreement, attached as Ex. 2 to Eschelon's Initial Brief.

²³ See *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, 2003 WL 1917249, FCC 03-96, rel.: April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (holding that the Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement).

²⁴ 47 USC 252(i).

²⁵ The rule is attached to Eschelon's Initial Brief as Ex. 5.

²⁶ See First Report & Order at ¶ 1296.

service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement."

The rule further provides that the ILEC (Qwest) is required to allow the CLEC (Eschelon) to pick and choose unless and until "the incumbent proves to the state commission" that either the costs of providing the service to the requesting carrier (Eschelon) are greater than the costs of providing it to the original carrier (McLeod), or it is not technically feasible to provide the service to the requesting carrier.²⁷ The burden is clearly on Qwest to prove that "pick and choose" is not required here because of cost or technical infeasibility.²⁸

The FCC concluded that Section 252(i) itself acts as a most favored nation clause, whether or not included in the parties' interconnection agreement,²⁹ as a method to ensure nondiscriminatory rates. The FCC stated:

We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis.³⁰

While Qwest has suggested that the costs of providing UNE-Star differ between Eschelon and McLeod because of differing terms such as volume, Qwest has simply failed to meet its burden of proof that its cost to provide the UNE to Eschelon is significantly greater than its cost to provide it to McLeod.

The fact that Eschelon and McLeod entered into UNE-Star agreements within 45 days of each other in 2000 is undisputed. The agreements were virtually identical with the exception of two major items-term and volume: the initial term of the McLeod agreement expired on December 31, 2003, whereas

²⁷ 47 CFR § 51.809(b)

²⁸ Technical infeasibility has not been raised by Qwest as it is already providing UNE-Star to Eschelon.

²⁹ Under Eschelon's ICA, Qwest must provide network elements to Eschelon on rates, terms and conditions no less favorable than those provided to itself or any other party. See Part A, Part III, Sec. 37, pp. 28-29 of the Eschelon Interconnection Agreement, attached as Ex. 2 to Eschelon's Initial Brief.

the initial term of the Eschelon Agreement expired on December 31, 2005; McLeod committed to purchase at least 275,000 local exchange lines per year, but Eschelon only committed to purchase at least 50,000 access lines per year. Both agreements contain Attachment 3.2, which set out identical rates for the two companies despite the differences of term and volume.

In September of 2002, McLeod and Qwest entered into a new amendment of their UNE-Star Agreement, reducing the pricing of UNE-Star to McLeod by about 9%, without changing any other terms. The McLeod UNE-Star agreement termination date and volume commitments did not change, nor did any other term in the McLeod agreement.

On this record, Qwest has failed to establish that the cost of providing the service would increase as a result of providing this discount to Eschelon. As such, Eschelon is entitled to the price reduction.

C. Eschelon Should Be Allowed To Adopt Price Reduction For Same Term As McLeod

The Department agrees with Qwest, however, that Eschelon should be bound by the term of the price reduction. It is undisputed that the specified term of the McLeod ICA--and pricing discount--is *shorter* than Eschelon's contract term.³¹ Again, section 252(i) of the Act provides that:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those *provided* in the agreement (emphasis added).

The FCC provided some, but not complete guidance in its Rules:

Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section *for a reasonable period of time* after the approved agreement is available for public inspection under § 252(f) of the Act (emphasis added).³²

While the Commission has never formally ruled on the exact issue presented in this case, it recently touched on this issue albeit in the context of the adoptability of an agreement that had gone past its

³⁰ See First Report & Order at ¶ 1316.

³¹ An interesting issue is raised if the terms of the basic ICA terminate/expire before these amendments. For example, counsel for Eschelon stated in an earlier proceeding dealing with rates, "The other thing that all parties to this negotiation knew was that our agreement was set to expire soon, our underlying agreement. and in fact it has expired now and is in Evergreen status. And that meant even though we negotiated those rates and were entitled to those rates, we knew and Qwest knew that they could change once the agreement expired." See transcript of proceedings, *In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc., Against Qwest Corporation*, MPUC Docket No. P-421/C-02-550 (August 29, 2002) at 8. Similarly in this case, both Qwest and McLeod would have known that the UNESStar amendment, if not the entire underlying ICA, would soon expire.

expiration date, but where the network elements were still being provided under the agreement--the so-called "evergreen" status.³³ There, after seeking comment from the industry, the Commission adopted a Policy Statement which provided:

(i) The upper limit of the adoption window is the termination date stated in an ICA for those ICAs where the ILEC is no longer providing interconnection, elements, or services to any CLEC or CMRS provider under the terms of the ICA in question.

(ii) The adoption window remains open for an ICA after the termination date stated therein to the extent that the ILEC continues to provide interconnection, elements, or services to any CLEC or CMRS provider under the ICA in question. Any adopting CLEC or CMRS provider would be subject to the same termination provisions as negotiated by the original negotiating carrier.

(iii) Notwithstanding (i) and (ii), the availability of an ICA for adoption shall be bounded by a showing by the ILEC that, pursuant to § 51.809(b), (a) it is not technically feasible to provide service to the requesting carrier, or (b) the costs of providing service to the requesting carrier are higher than the costs of providing service to the original negotiating carrier.

(iv) To the extent that there is a debate as to interpretation of "provided" in § 252(i) the parties may approach the Commission for resolution.³⁴

The Commission fully recognized that its policy did not have the force and effect of law and only provided a starting point for deliberations.³⁵ However, the Department sees no compelling basis in this record to deviate from that policy.

Therefore, Eschelon should receive the benefit of the reduced pricing from the time of their initial request until at least until December 31, 2003, (the expiration date of McLeod Amendment), at which time Eschelon would revert to the original pricing for the remaining two years (to December 31, 2005) of Eschelon's amendment). To the extent that this amendment will survive expiration of the underlying ICA or will itself go into an "evergreen" type status or where McLeod continues to reap the benefit of these lower UNE rates, Eschelon should continue to benefit as well.

D. Other ICA Differences Cited By Qwest.

Qwest has identified four other ways in which the two contracts differ: (1) Termination dates; (2) CCMS (Custom Call Management System); (3) A \$0.35 monthly recurring rate for AIN features;

³² See FCC Rule § 51.809(c); *see also*, First Report and Order at ¶ 1319.

³³ See *In the Matter of the Inquiry Regarding the Adoptability of interconnection Agreements Pursuant to Section 252(i) of the Telecommunications Act of 1996*, MPUC Docket No. P-999/CI-02-116 (May 16, 2002) (attached as Ex. 1).

³⁴ *Id.* at 2.

(4) Eschelon has non-recurring charges for UNE-Star, added as part of the above-referenced CCMS amendment, which McLeod does not.³⁶

Without repeating all of Eschelon's arguments here, the Department agrees with Eschelon that none of those differences are legitimately related to the rate for UNE-Star; they are additional terms applicable to Eschelon, rather than related terms of the McLeod agreement that Eschelon seeks to avoid.³⁷ As Eschelon points out, it is seeking to opt-in to the McLeod rates for UNE-Star, not the other way around. Therefore, the relevant question is not what terms Eschelon has in its agreement, but rather what terms McLeod has in its agreement. Qwest should not be allowed to use the additional, unrelated terms in the Eschelon agreement to prevent Eschelon from opting in to the McLeod UNE-Star pricing.

Because Qwest has failed to establish that any of these four differences are legitimately related to the price that McLeod pays for UNE-Star, the ALJ should recommend that the Commission require Qwest to provide Eschelon with the McLeod UNE-Star pricing.

E. The Commission Has The Authority To Correct The Harm Caused By Qwest's Conduct.

The Commission has the authority to award damages for Qwest's refusal to allow adoption of the lower UNE rates both by state statute and because of express authority granted by the ICA herein.

1. The Commission has authority to issue an order to correct the discrimination caused by Qwest's refusal to allow adoption of the reduced UNE rates.

As a creature of statute, the Commission enjoys only the authority granted to it by the legislature. *See Frost-Benco Elec. Ass'n v. Public Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984); *Great Northern Ry. v. Public Serv. Comm'n*, 284 Minn. 217, 220-21, 169 N.W.2d 732, 735 (1969). That authority may be either express or implied. "While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Peoples Natural Gas Co. v. Public Utils. Comm'n*, 369 N.W.2d 530, 534-36 (Minn. 1985). In *Peoples Natural Gas*, the Minnesota Supreme court held that that the Commission lacked express or implied authority to enforce its own orders by ordering a

³⁵ *See Id.* at 1.

³⁶ *See* Response to Esch 016, attached to Eschelon's Initial Brief as Ex. 6.

³⁷ *See* Eschelon Initial Brief at 7-10.

customer refund, noting that other enforcement tools were available in the statutes. The Court based its conclusion on Minn. Stat. § 216.27, the controlling statute at that time for gas company rates, which specifically provided only for prospective relief.

Minn. Stat. § 237.081, subd. 4 provides that if the Commission finds that “any rate, toll, tariff, charge, or schedule, or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service, is in any respect unreasonable, insufficient, or unjustly discriminatory,” the Commission “shall make an order respecting the tariff, regulation, act, omission, practice, or service that is just and reasonable and, if applicable, shall establish just and reasonable rates and prices.”

This statute not only authorizes the Commission to award prospective relief “if applicable,” the statute clearly allows the Commission to “make an order respecting the * * * practice, or service that is just and reasonable * * *.” This language does not state or imply that the Commission’s authority to award damages or other remunerative relief for a past episode is limited. Had the legislature intended to limit the Commission as suggested by Qwest, it could and would have said so in more explicit terms. The legislature obviously recognized the need to give the Commission broad authority to address the broad type of harm that could be caused by improper company practices.³⁸

In an unpublished decision of the Minnesota Court of Appeals, *In the Matter of the Formal Complaint of the Members of the MIPA Against US West Communications, Inc.*, No. CO-97-606 (Dec. 30, 1997) (unpublished opinion) (copy attached pursuant to Minn. Stat. § 480A.08(3) as Ex. 2), the Court reviewed Minn. Stat. §§ 237.081 and .461, as well as the decision in *Peoples Natural Gas*, and held that the Commission had authority to establish just and reasonable rates and order appropriate action, including retroactive refunds. *See Id.* at 3.

In the present case, because Eschelon established that Qwest improperly provided McLeod more favorable and discriminatory pricing than Eschelon, the Commission has the authority to order a retroactive refund.

³⁸ See also *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Order After Reconsideration on Own Motion, Docket No. P-421/C-02-197 (April 30, 2003) (Holding that the Commission has statutory authority to order monetary payments to correct discriminatory conduct).

2. The ICA provides the Commission with authority to award monetary damages.

Even if the Commission somehow lacks state statutory authority to award damages in this case, the Commission has express authority to enforce the ICA, which includes whether Qwest has violated Eschelon's right to its so-called "most favored nation" provision. The underlying ICA specifies that damages and equitable relief are remedies available under the ICA,³⁹ and the fact that the parties specifically agreed in the ICA that the Commission has jurisdiction and the authority to enforce the ICA.⁴⁰ The assertion further disregards FCC and federal court decisions in which the state commissions have been held to have continuing authority to enforce ICAs.⁴¹

Specifically, Section 11.1 of the ICA constitutes an agreement by the parties that the Commission has jurisdiction to enforce the ICA and states, in part, "The Parties...agree that the Commission has continuing jurisdiction to implement and enforce all term and conditions of this Agreement..." The ICA further specifies that damages and equitable relief are remedies available under the ICA.⁴² The parties specifically agreed in the ICA that the Commission has jurisdiction and the authority to enforce the ICA.⁴³

³⁹ See ICA § 10.4 (attached as Ex. 3 at 3). The ICA, at sections 8.4, 10.1, 10.2 and 10.4 preserve all remedies available to the parties at law and equity, including injunctive relief, specific performance, equitable remedies, and remedies available at law or by administrative process (copies of these sections are attached as Ex. 2).

⁴⁰ See § 11.1. (The ICA specifies that "[t]he Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement...may be submitted to the Commission for resolution.")

⁴¹ See *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274, (11th Cir. 2003) (holding that enforcement of ICA provisions, including compensation provisions and liquidated damages provision clearly contemplated by the Telecommunications Act and within the authority of state commissions); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (The Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement); *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, 2003 WL 1917249, FCC 03-96, rel.: April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.)

⁴² See ICA § 10.4 (Ex. 3 at 3). The ICA, at sections 8.4, 10.1, 10.2 and 10.4 preserve all remedies available to the parties at law and equity, including injunctive relief, specific performance, equitable remedies, and remedies available at law or by administrative process.

⁴³ See § 11.1 (Ex. 3 at 3-4). (The ICA specifies that "[t]he Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement...may be submitted to the Commission for resolution.")

Again, the FCC and federal courts have held that the state commissions have continuing authority to enforce ICAs.⁴⁴ Qwest has failed to establish that the Commission lacks authority to enforce the other provisions of the ICA that set forth the remedies for breach to which the parties agreed.

Such an outcome is consistent with established legal precedent holding that state commissions may enforce ICA provisions, including provisions on compensation and damages.⁴⁵

IV. CONCLUSION

Based upon the forgoing, the ALJ should recommend that the Commission find that Eschelon was entitled to the same rate as McLeod for UNE-Star and the Commission should order Qwest to change that rate for Eschelon. The lower prices should be deemed effective as of the date that Eschelon first requested to adopt that rate, and for the remainder of the term of the McLeod Amendment or for so long as McLeod continues to benefit from that rate, whichever is longer. The ALJ should further recommend that the Commission order retroactive monetary relief to Eschelon to correct Qwest's improper and discriminatory conduct.

Dated: _____

Respectfully submitted,

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DEPARTMENT OF COMMERCE**

⁴⁴ *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (The Telecommunications Act provides that an interconnection agreement must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement); *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, 2003 WL 1917249, FCC 03-96, rel.: April 23, 2003 ¶ 29 and note 85 (the great weight of court and Commission authorities hold that state commissions have authority to enforce interconnection agreements) (citations omitted.)

⁴⁵ *See, e.g., MCI Telecommunications Corp. v. Bellsouth Telecommunications, Inc.*, 298 F.3d 1269, 1274, (11th Cir. 2003) (enforcement of ICA provisions, including compensation provisions and liquidated damages provision clearly contemplated by the Telecommunications Act and within the authority of state commissions).

AG: #896700-v1

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendrayner
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

In the matter of the Complaint of Eschelon
Telecom of Minnesota, Inc. against Qwest
Corporation, formerly known as U S West
Communications, Inc.

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Docket No. P _____

**COMPLAINT AGAINST QWEST
CORPORATION, AND REQUEST
FOR EXPEDITED PROCEEDING
PURSUANT TO MINN. STAT. 237.462**

Eschelon Telecom of Minnesota, Inc. ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1. Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual, statutory, and other obligations to provide interconnection at non-discriminatory rates as required under the Telecommunications Act of 1996 (the Act) and state law.

2. Specifically, Qwest charges Eschelon higher rates for UNE-Star than it charges to McLeodUSA. Qwest's refusal to make UNE-Star available to Eschelon at the same rate it is provided to McLeod is contrary to the Act, the parties' Interconnection Agreement (ICA) and Chapter 237 of the Minnesota Statutes. Furthermore, Eschelon is entitled to a refund of payments made for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs. Qwest's failure to reprice those circuits violates the Act, Chapter 237 of the Minnesota Statutes and the parties' Interconnection Agreement.

3. Due to the continuous nature of Qwest's violations of law related to these practices, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6. Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by

the Commission pursuant to Minn. Stat. § 237.081, Subd. 1(a), the issuance of an administrative penalty order by the Commission pursuant to Minn. Stat. § 237.462, Subds. 1 and 2, the issuance of an Order requiring Qwest to provide UNE-Star to Eschelon at non-discriminatory rates and ordering repricing of special access at EEL rates, and such other relief as the Commission deems appropriate.⁴⁶

4. Eschelon is a competitive local exchange carrier (“CLEC”) providing local and interexchange telecommunications services in Qwest’s service territory in Minnesota, primarily serving small business customers. As a CLEC in competition with Qwest and other CLECs, Eschelon must establish and retain its reputation as a viable alternative to the incumbent telephone company. In order to compete, Eschelon must avail itself of rights provided under law to gain competitive access to the market.

5. Eschelon’s principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402. Eschelon is certified to provide local exchange service in Minnesota pursuant to orders of the MPUC dated July 18, 1996 and April 12, 1999.

6. Eschelon is represented in this proceeding by its attorney:

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
Telephone: (612) 436-6249
Facsimile: (612) 436-6349

7. Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier (“ILEC”) within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the “Act”), and provides local exchange, exchange access and inter-exchange services in Minnesota subject to the Commission’s regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota.

8. Eschelon has served Qwest with this Complaint through:

⁴⁶ Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

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Inter-Connection
1801 California Street
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Denver, Colorado 80202

Qwest Communications Director
Interconnection Compliance
1801 California Street
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Denver, Colorado 80202

JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 251(c)(1)(D) and (3) (authority of state commissions to enforce requirement that Qwest provide facilities and equipment "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory..."), 47 U.S.C. §252(e) (authority of state commissions to enforce interconnection agreements), 47 U.S.C. 252(I) and 47 C.F.R. 51.809 (1997), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, and Subds. 1 and 6 (competitive enforcement).

FACTUAL BACKGROUND

A. ESCHELON IS ENTITLED TO THE SAME RATES AS MCLEOD FOR UNE-STAR.

1. On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Exchelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement are attached as Exhibit A-1.⁴⁷

2. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. *Id.*, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

3. On October 1, 2000, Qwest and McLeodUSA entered into the Eighth Amendment to their Interconnection Agreement. Exhibit A-2. That Amendment was filed with the Commission on December 20, 2000 in Docket P5323,421/IC-00-1707, and approved on January 26, 2001. That Amendment provided for UNE-M or UNE-Star⁴⁸ at the rates listed in the Addendum to that Amendment.

4. On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their Interconnection Agreement (UNE-Star Amendment). Exhibit A-3. The Amendment was approved by the Commission on January 26, 2001 in Docket No.P5340,421/IC-00-1657. This Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The rates were the same as the rates in the McLeodUSA UNE-Star Amendment even though the termination dates and the volume commitments differed greatly.

5. On July 31, 2001, Eschelon and Qwest entered into the Twelfth Amendment to their Interconnection Agreement, which allowed Eschelon to purchase switch-based Advanced Intelligent Network (AIN) features, at retail rates, as well as other switch-based features and listing charges to be included in the UNE-Star (referred to in the Amendment as UNE-P) flat rate. Exhibit A-4. Adding additional features into the flat-rated UNE-Star charge of the right to purchase such AIN features as a part of UNE-Star, resulted in a 35-cent increase in the recurring rates for Eschelon. See Amended Attachment 3.2 in Exhibit A-4.

6. On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement, which amended the pricing of UNE-Star for McLeodUSA. A true and correct copy of the Amendment is attached hereto as Exhibit A-5. The Amendment provided for a reduction of UNE-Star rates in Minnesota from \$27.00 per month to \$24.50 per month for McLeod. That Amendment was approved by Commission Order dated February 7, 2003, in Docket No. P-5323,421/IC-02-1566.

7. Immediately thereafter, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeodUSA. Qwest has repeatedly refused to do so unless Eschelon agrees to all other terms and conditions of the Qwest/McLeodUSA Amendment. Engels Letter, Exhibit B-5.

⁴⁷ All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.

⁴⁸ At various times and in various documents, the services at issue are referred to as UNE-E and UNE-M, or UNE-Star. Throughout this document, the term UNE-Star will be used to refer to all three.

8. Eschelon's Interconnection Agreement provides that Qwest must provide network elements to Eschelon on rates, terms, and conditions no less favorable than those provided to itself or any other party. Exhibit A-1, Part A, Part III, Sec. 37, pp. 28-29.

9. The prices for UNE-Star contained in the McLeodUSA Agreement and Eschelon agreements were exactly the same, despite these other terms and conditions that Qwest now claims are tied to the prices in the amended agreement. The only difference in the rates that is justified is that the equivalent prices for Eschelon should be 35 cents higher than the McLeodUSA rates due to the AIN Amendment. Therefore, Eschelon's UNE-Star rate recurring rate should be \$24.85, compared with the rate of \$24.50 for McLeod and instead of the \$27.35 currently being charged to Eschelon.

10. Section 252(i) of the Act provides that Qwest must provide network elements to Eschelon at the same rates, terms and conditions as it provides it to McLeodUSA. As the FCC stated in the First Report and Order, CC Docket No. 96-98, released August 8, 1996, ¶ 1314 ("First Report"): "In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement."

Furthermore, the FCC stated:

[W]here an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

First Report, ¶ 1317.

11. The rates for UNE-Star are not volume based. If they were the rates originally charged to McLeodUSA and Eschelon for that product would not have been identical. The rates are not tied to the termination date. The termination dates of the McLeodUSA and Eschelon agreements were different in the original agreements, yet the rates were the same. The termination date of the McLeodUSA agreement did not change in the Amendment. The only difference in the services provided is an agreement between Eschelon and Qwest that gives Eschelon the opportunity to order additional features at a flat-rated charge. Eschelon concedes that its rate should be 35 cents higher to reflect that difference.

12. At no time has Qwest requested Commission authority to price UNEs differently based on volumes. The Commission has conducted two exhaustive cost dockets to establish UNE prices, and Qwest did not, at any time during those proceedings, present evidence that volumes purchased should impact price. The Commission never established prices that varied by volume for UNEs including Star.

13. Section 252(i) of the Act and 47 C.F.R. 51.809 of the FCC's rules require that the price made available to McLeodUSA must be available to Eschelon.

14. Section 252 of the Act requires that Qwest make UNE-Star available to Eschelon at nondiscriminatory rates. Qwest refuses to do so. As a consequence, Qwest has overcharged Eschelon approximately \$4,145 per month for UNE-Star since September of 2002, and is continuing to do so on an ongoing basis. The Commission should require Qwest to charge Eschelon the McLeodUSA UNE-Star rates and order Qwest to refund the amounts overcharged.

B. ESCHELON IS ENTITLED TO EEL RATES FROM THE TIME OF INSTALLATION OF ITS SPECIAL ACCESS CIRCUITS.

1. An Enhanced Extended Loop or EEL is a combination of a Loop and dedicated interoffice transport; network elements that Eschelon is entitled to purchase and to combine under its Interconnection Agreement. Exhibit 1-A, Part A, Part III: Unbundled Network Elements.

2. On November 5, 1999 the FCC ruled that EELs must be made available to CLECs at unbundled network element prices. *Third Report and Order*, 15 FCC Rcd at 3909. Paras. 480-81 (citing 47 C.F.R. 51.315(b)). The FCC required that ILECs, upon request, must convert or re-price special access circuits into an EEL.

3. In late 1999 and early 2000, Eschelon wanted to purchase this combination of elements to conduct its business in Minnesota. However, Qwest did not provide a process for Eschelon to order EELs or convert its special access circuits to EELs until October, 2001. Prior to that date Qwest instructed Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed retail rates, as opposed to UNE rates, for this combination of network elements.

4. From March 2000 through October 2001, Eschelon purchased 113 special access circuits from Qwest's Minnesota and FCC Private Line Tariff for use as EEL equivalents.

5. Eschelon initially ordered EELs as special access circuits using an Access Service Request (ASR). When Eschelon objected to paying the retail, as opposed to wholesale, rate for this resold service, Qwest responded that Eschelon was supposed to have ordered these circuits on a Local Service Request (LSR), and that by ordering it using an ASR Eschelon had ordered it as an access service for which no wholesale discount was required. When Eschelon pointed out that no matter what form was used to order it the service was being used to provide EELs, Qwest insisted that it was the form used to order the service that dictated the substance and the price.

6. This position was contradicted by Qwest on March 8, 2001, when Qwest issued a notice stating that the ordering process for EELs had been changed. Qwest acknowledged that the "current ordering method for provisioning of EEL products is done via an Access Service Request (ASR). Qwest has modified systems to now accept conversion and provisioning of EEL's(sic) via the Local Service Request (LSR)." Exhibit B-1.

7. Thus Qwest's own notice acknowledged that EELs were properly ordered on an ASR until March of 2001. Qwest's notice also confirmed that whether an order is processed by use of an ASR or LSR does not define the use or nature of the service. Neither the service, nor the rate changed when the ordering process was changed by Qwest.

8. Qwest claims that it made EELs available in March of 2000. That claim is not valid. While it is true that on March 30, 2000, Eschelon received a notice from Qwest about the availability of EELs (Exhibit B-2).⁴⁹ That notice specified that EEL "is only available for new requests (i.e., no conversions of existing services) and is only available if an end user is served out of the following wire centers:" (parenthetical added). It then listed wire centers where EELs were not, in fact, available.⁵⁰ Thus, Qwest's announcement specified that existing circuits could not be converted to EELs and that new requests for EELs were only available in certain limited locations. Furthermore, despite this announcement, Qwest continued to instruct Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed as opposed to UNE rates for the combinations.

9. Furthermore, before Qwest would even consider providing EELs, it required that Eschelon enter into an amendment to the Interconnection Agreement even though the ICA provided for such combinations. Thus, Qwest would not honor Eschelon's request unless Eschelon agreed to an unnecessary and one-sided amendment to the Interconnection Agreement. Eschelon refused and demanded its right to EELs under the already existing Agreement and Qwest refused to provide EELs unless a new amendment was signed. Finally, in February 2001, Qwest issued a notice (Exhibit B-3, attached) that conceded that if an existing interconnection agreement contains the elements and rates necessary for the requested combination, no new amendment is necessary. The Qwest notice stated, in part: "...if a Co-

⁴⁹ Although the Notice states that the EEL product is available as of February 17, 2000, the Notice was not sent out until March 30, 2000.

⁵⁰ In fact, the Notice was erroneous, the wire centers listed were those in which EELs were not available, as opposed to those in which EELs were available.

Provider's Interconnection Agreement contains access to combinations in general, and the Agreement contains all Unbundled Network Elements and associated rates necessary to make the desired combination, an Amendment is not required." This notice once again contradicted Qwest's previous position.

10. In October of 2001, Eschelon was finally able to order and convert EELs in locations desirable to Eschelon. However, Qwest has refused to reprice the previously ordered special access circuits as EELs and refund the difference between the UNE and tariffed rates.

11. Qwest settled exactly the same issue with MCI WorldCom Network Services (WorldCom) under a Confidential Billing Settlement Agreement dated June 29, 2001. Exhibit B-4. As is explained in that Agreement, WorldCom claimed that approximately 2,500 private line circuits provided by Qwest to WorldCom in various states should have been converted to the Unbundled Network Element Platform known as EEL from tariffed services during the time period between September 4, 1997 through the date of the agreement. WorldCom was required to convert its private lines to EELs as part of the agreement and the parties agreed to a payment made by Qwest for past services billed. Eschelon has since also converted its private line circuits in April 2002.

12. Beginning in November of 2001, Eschelon made the request repeatedly to Qwest for a refund of the amounts paid for these circuits but did not received an answer. On February 10, 2003, Eschelon made a request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Qwest denied the request. Qwest admitted that the WorldCom agreement includes "a payment and resolution of past disputes regarding the conversion of private line circuits to EELs" but asserted it is not an Interconnection Agreement and therefore is not available for opt-in. Engels Letter (Exhibit B-5) at p. 2.

13. Eschelon has the same basic Interconnection Agreement as WorldCom including the entitlement to combinations like EELs. Qwest agreed to provide WorldCom with a payment as to this issue. Eschelon's identical dispute with Qwest should also result in Qwest's payment of the difference between the price Eschelon paid for these lines and the price it should have paid had Qwest provided Eschelon with combinations (i.e., EELs), as required by the parties' Interconnection Agreements.

14. Eschelon is requesting a refund of \$532,225 for Minnesota, for the difference between Qwest's tariffed rates billed and paid by Eschelon and Eschelon's Interconnection Agreement rates for elements that make up an EEL. Eschelon has calculated that from March 2000 through April 30, 2002, Eschelon was billed and paid \$839,671.37 for these circuits. Had Eschelon been able to order EELs during this time, it would have only had to pay \$307,445.91, or \$532,225.46 less than it paid.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THIS ISSUE BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1. As stated Eschelon has contacted Qwest to ask for the rates in the McLeodUSA Amendment. Qwest has taken the position that Eschelon must take all of the terms and conditions of the McLeodUSA Amendment including volume commitments, termination date and other provisions that are unrelated to price. Exhibits B-5 and B-6, Engels Letters.

2. Eschelon has also requested a refund of the difference between the tariffed rate for special access and the EEL rate from March 1, 2000 to October, 2001. Qwest also rejected that request. Exhibits B-5 and B-6. Engels Letters.

QWEST'S CONTINUING VIOLATIONS OF LAW

Qwest's refusal to provide Eschelon UNE-Star at the same rates that the service is provided to McLeodUSA and refusal to refund overcharges for EELs causes significant harm to Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota.

Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are generally delayed or impeded due to unreasonable and uncertain prices for capacity for its network.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law.

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law by, among other things:

(1) Failing to provide UNE-Star to Eschelon at the same, non-discriminatory rate that it provides the service to McLeodUSA.

(2) Failing to provide EELs to Eschelon at the Commission approved prices.

Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders.

Qwest's breaches of the Interconnection Agreement violate the Act, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Qwest's breaches further violate the Act by constituting a barrier to Eschelon's entry into the local market in Minnesota, prohibited in 47 U.S.C. § 253.

Qwest's conduct, as described above, harms the public interest, because Eschelon's ability to compete is adversely affected, thereby denying end users the traditional benefits of competition.

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

**REQUEST FOR EXPEDITED HEARING AND THE IMPOSITION OF
ADMINISTRATIVE PENALTIES**

A. AN EXPEDITED PROCEEDING IS NECESSARY.

The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit A-1, Section 11.1. Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. *Id.* The Agreement further provides that the Parties agree to seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

The Interconnection Agreement provisions in this regard are consistent with Minn. Stat. § 237.462, Subd. 6. That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest. In making this determination, the Commission may consider "any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element."

Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint have continued for some time without abatement, with significant harm to Eschelon and Eschelon's customers. Moreover, delay in resolving disputes of this nature inure to the benefit of the incumbent provider, since each day it can impose pricing uncertainty on Eschelon increases the business risk to Eschelon.

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission:

1. Investigate the issues raised in this Complaint pursuant to Minn. Stat. § 237.081, Subd. 1;
2. Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn. Stat. § 237.462, Subd. 6;
3. Declare that the actions of Qwest detailed above constitute continual violations of its Interconnection Agreement with Eschelon;
4. Declare that the actions of Qwest detailed above constitute continual violations of Minn. Stat. §§ 237.06, 237.121(a)(2) and 237.121(a)(4);

5. Declare that the actions of Qwest detailed above constitute multiple and continual violations of the Act, including 47 U.S.C. 251(c)(2)(D) and (3), and 252 (i) and the relevant rules;
6. Order that Qwest make UNE-Star available to Eschelon at the same rates that it is available to McLeodUSA, back to the date of the date of the McLeodUSA Amendment.
7. Order Qwest to immediately refund to Eschelon the difference between the rate for special access circuits and EELs for all relevant periods.
8. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract;
9. Assess administrative penalties against Qwest for its repeated violations of state and federal law and the Interconnection Agreement, as authorized by Minn. Stat. § 237.462, Subd. 1; and
10. Grant Eschelon such other and further relief as the Commission deems appropriate.

Dated: April _____, 2003

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESCHELON TELECOM OF WASHINGTON, INC.; ESCHELON TELECOM OF ARIZONA, INC.; ESCHELON TELECOM OF COLORADO, INC.; ESCHELON TELECOM OF MINNESOTA, INC.; ESCHELON TELECOM OF OREGON, INC.; and ESCHELON TELECOM OF UTAH, INC.,)	No. C03-1296R
)	
)	COMPLAINT
)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
QWEST CORPORATION,)	
)	
Defendant.)	

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1332. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs and is between citizens of different states. Eschelon Telecom of Washington, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Arizona, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Colorado, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Minnesota, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Oregon, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Eschelon Telecom of Utah, Inc., is incorporated in Minnesota and has its principal place of business in Minnesota. Qwest Corporation (“Qwest”) is incorporated in Delaware and has its principal place of business in Colorado.

2. This Court also has jurisdiction under 28 U.S.C. § 1331. The claims stated herein arise under the laws of the United States, specifically, the Telecommunications Act of 1996, codified in various sections commencing at 47 U.S.C. § 151, *et seq.*

3. The Western District of Washington at Seattle is the proper venue under 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to the claim occurred in King County, and Qwest is subject to personal jurisdiction in King County.

PARTIES

4. Plaintiffs (collectively, “Eschelon”) are competitive local exchange carriers (“CLECs”) that provide local exchange telephone service. Eschelon serves markets in Qwest’s territory in Seattle-Tacoma, Washington; Phoenix, Arizona; Denver-Boulder, Colorado; Minneapolis-St. Paul, Minnesota; Portland-Salem-Eugene, Oregon; and Salt Lake City, Utah. Eschelon is the successor to American Telephone

Technology, Inc., Electro-Tel, Inc., Cady Telemanagement, Inc., and Advanced Telecommunications, Inc. Eschelon provides local exchange telephone service to customers in two primary ways: through Eschelon's telephone network, and through a telephone network owned by an incumbent local exchange carrier (*e.g.*, Qwest), to which Eschelon has or its predecessors had access pursuant to interconnection agreements as required by 47 U.S.C. §§ 251-252. Eschelon has satisfied all prerequisites necessary to bring this action.

5. Qwest is an incumbent local exchange carrier ("ILEC") that, in pertinent part, provides services, equipment, facilities, and network elements to Eschelon and other CLECs pursuant to interconnection agreements, as required by 47 U.S.C. §§ 251-252. Qwest merged with, and is the successor to, U S West, Inc., the parent company of U S West Communications, Inc. ("U S West"). Qwest is liable for the contracts that U S West entered into with Eschelon or Eschelon's predecessors, as described below.

FACTS

The Parties' Interconnection Agreements

6. In 1999 and 2000, Qwest's and Eschelon's predecessors arbitrated, negotiated or opted into interconnection agreements for every state in which they both do business, namely, Washington, Arizona, Colorado, Minnesota, Oregon, and Utah. These agreements established rates, terms, and conditions for the interconnection of Eschelon's and Qwest's telecommunications networks, as well as for the provision of certain services by Qwest to Eschelon.

7. For Washington, the interconnection agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Arizona, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Colorado, the agreement is the "Interconnection Agreement" between U S West and Electro-Tel, Inc. For Minnesota, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and Cady Telemanagement, Inc. For Oregon, the agreement is the "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and American Telephone Technology, Inc. For Utah, the agreement is "Agreement for Local Wireline Network Interconnection and Service Resale" between U S West and Advanced Telecommunications, Inc. The foregoing contracts are collectively referred to herein as the "Interconnection Agreements."

8. On November 15, 2000, Qwest and Eschelon executed an "Interconnection Agreement Amendment Terms" ("Interconnection Agreement Amendment") that amended the terms of the Interconnection Agreements.

Carrier Access Billing System

9. Qwest and Eschelon own and operate digital loop carrier facilities and voice switching facilities in the geographic areas in which they do business. As the incumbent local exchange carrier, Qwest is required by federal law to permit Eschelon and other local exchange carriers to interconnect with Qwest's network. Pursuant to the Interconnection Agreements, as amended, Eschelon leases Qwest's distribution and transport network to link Eschelon's customers to Eschelon's switches in order to provide them with telecommunications services. In addition, Eschelon leases combinations of Qwest's distribution plant and Qwest's switching facilities to serve the portion of Eschelon's customers that are not served by Eschelon's switches.

10. Under federal law, local exchange carriers, such as Eschelon, are to be compensated for the cost of transporting and terminating telephone calls that are originated or terminated from or to their customers by customers of other telecommunications carriers. If a caller in New York calls an Eschelon customer in Washington, for example, Eschelon is entitled to collect an access charge from the caller's long distance carrier. Similarly, if an Eschelon customer in Washington calls someone in New York, Eschelon is also entitled to collect an access charge from its customer's long distance carrier.

11. Qwest is one of several long distance carriers from which Eschelon is entitled to collect access charges. Long distance carriers route calls to, and receive calls from, either designated Qwest end office switches (dedicated end office transport), or from access tandems in every geographic area in which Eschelon conducts business. In order to collect access charges, Eschelon must be able to provide long distance carriers with call records of long distance calls, formatted according to industry standards. These records are produced by Eschelon's switches in some instances, and by Qwest's access tandem or local switches or end office switches in others.

12. In the industry, the process by which long distance calls generate records – which are used to collect access charges from long distance carriers – is known as the Carrier Access Billing System (“CABS”). Eschelon’s switches generate CABS records for long distance calls *originated* by Eschelon’s customers who are served by Eschelon’s switches (on-net customers). However, Eschelon must rely on Qwest to provide CABS records of long distance calls *received* by customers who are served by Eschelon’s switches (on-net customers), as well as for all long distance calls *made or received* by Eschelon’s customers who are served by Qwest’s switches using unbundled network element combinations (off-net customers).

13. The underlying Interconnection Agreements for each state (*e.g.*, Section 7 of Attachment 7 of the Interconnection Agreement for Minnesota) and Section 3.3 of the Interconnection Agreement Amendment, require Qwest to provide complete and accurate CABS records for Eschelon’s on-net and off-net customers on a daily basis so that Eschelon can bill interexchange or other companies for access charges. Therefore, Qwest is obligated to provide Eschelon with complete and accurate CABS records so that Eschelon can collect the access charges it is entitled to from long distance carriers, including Qwest, for long distance calls pursuant to the Interconnection Agreements and federal law.

14. Qwest has provided Eschelon with some CABS records, but Eschelon has discovered that Qwest has not provided all of the CABS records for Eschelon’s on-net and off-net customers. In 2001 and 2002, Eschelon engaged third-party telecommunications consultants to audit the completeness and accuracy of the CABS records provided to Eschelon by Qwest. The audits included test calls to Eschelon customers and test calls from Eschelon customers. In addition, Qwest conducted an audit of its CABS records in cooperation with Eschelon. Based upon the most recent audit, Eschelon found that Qwest’s CABS records failed to capture approximately 16% of the total call records for which Eschelon would have been entitled to collect access charges. In addition, Eschelon found that Qwest has not provided complete and accurate CABS records for Qwest-carried long distance toll calls that terminated on Eschelon’s on-net lines, an omission that financially benefits Qwest to Eschelon’s detriment.

15. Qwest is liable for incidental and consequential damages under the Interconnection Agreements for breaches that are repeated or are found to be a pattern of conduct. Qwest has continually failed to provide Eschelon with complete and accurate CABS records, even after Eschelon raised the issue with Qwest. Qwest’s failure to provide Eschelon with complete and accurate CABS records deprives Eschelon of substantial compensation to which Eschelon is entitled. As a result, Eschelon has been unable to bill for and collect approximately \$77,500 per month in access charges, for a total of approximately \$1.2 million from March 2002 through May 2003. The Interconnection Agreements (*e.g.*, Section 4 of Part A of the Interconnection Agreement for Minnesota, and Sections 17-18 of Attachment 7) also require Qwest to pay for Eschelon’s audit costs. Eschelon has incurred approximately \$288,000 in auditing costs for the most recent CABS auditing projects. Qwest has refused to pay such costs.

Automated Conversion of Eschelon’s Resale Customer Base to UNE-E

16. Eschelon has been a wholesale customer of Qwest and its predecessors since 1996. Initially, Eschelon purchased some of Qwest’s services under the “Resale” provisions of the Interconnection Agreements. The Interconnection Agreements and federal law also allow Eschelon to provide telecommunications service to its customers through Qwest’s unbundled network elements (“UNEs”). UNEs are parts of an ILEC’s (*e.g.*, Qwest’s) network, such as the loop, switching, and transport functions. Pursuant to 47 U.S.C. § 251(c)(3), ILECs are required to offer UNEs for lease to CLECs. UNEs enable a CLEC to provide telecommunications service to customers who are not served directly by the CLEC’s switch and telephone lines.

17. In 2000, Eschelon had a contractual right to convert its base of 49,000 resale lines to a Qwest product known as unbundled network element platform (“UNE-P”), as well as to order UNE-P for new lines. However, Qwest was not prepared to provide Eschelon with the prices, services and quality that Eschelon was entitled to under the UNE-P platform. Instead, Qwest offered to provide the prices, services and quality that Eschelon wanted through a new product (later called UNE-Eschelon or “UNE-E”).

18. During the negotiations regarding UNE-E, Eschelon questioned how Qwest intended to convert Eschelon’s 49,000 resale lines to UNE-E without disruption in service or functionality. Qwest responded that it could perform an automated (as opposed to manual) conversion process, but Eschelon would have to pay for Qwest to do so. Eschelon agreed. Pursuant to Paragraph 2.1 of the Interconnection Agreement Amendment, Qwest promised to convert Eschelon’s base of resale customers to the UNE-E

platform and release Eschelon from any termination liability in exchange for Eschelon's payment to Qwest of \$10 million. Of the \$10 million, Eschelon paid \$4 million for Qwest to automatically convert Eschelon's resale customers to the UNE-E platform and avoid the service disruptions and errors that a manual conversion would cause.

19. In addition to Qwest's promise to prevent service disruptions during the conversion itself, Qwest promised that the conversion would result in accurate bills, so that the bills would no longer reflect the wholesale discount associated with resale service, and would instead show the UNE-E rates in the Interconnection Agreement Amendment. Thus, Qwest was obligated to provide Eschelon with an automated conversion to a working UNE-E product.

20. Despite Qwest's promises to the contrary, Qwest never converted (automatically or otherwise) Eschelon's resale base to an accurately billed UNE-E product. To date, Eschelon has not obtained any benefit from the \$4 million it paid Qwest.

Commercially Viable DSL Service

21. CLECs typically provide their customers with high-speed Internet access through digital subscriber lines ("DSL"). Under Section 2.2 of the Interconnection Agreement Amendment, Qwest agreed to make DSL service available to Eschelon's customers through the UNE-E platform, beginning November 15, 2000. After the amendment was signed, Eschelon discovered that Qwest did not have a process in place to provide commercially viable DSL service. As a result, Eschelon was not able to offer or provide its customers with Qwest DSL service until August 2001, despite Qwest's commitment to provide Eschelon with DSL service as of November 15, 2000.

22. Given that numerous Eschelon customers had ordered DSL service from Eschelon, and Qwest was unable to fulfill the orders, Eschelon was required to purchase DSL service from another supplier at substantially higher prices. As a result of Qwest's breach, Eschelon's costs to provide its customers with DSL service was approximately \$1.7 million higher than the costs Eschelon would have incurred otherwise.

FIRST CAUSE OF ACTION – BREACH OF CONTRACT (CABS)

23. Eschelon re-alleges the allegations contained above.

24. Qwest contracted with Eschelon and promised, for valuable consideration, to provide complete and accurate CABS records for long distance calls to and from Eschelon's customers for Eschelon's use in billing long distance carriers for access charges. Eschelon performed its obligations in all material respects. Qwest has engaged in a pattern of conduct that has repeatedly breached the contract by failing to provide Eschelon with the data necessary to bill for such calls. As a proximate result, Eschelon has suffered damages (including incidental damages, consequential damages, and audit costs) in an amount to be proven at trial (but no less than \$1.2 million, from March 2002 through May 2003, plus the \$288,000 in unpaid auditing costs that Eschelon incurred to confirm Qwest's breaches).

SECOND CAUSE OF ACTION – BREACH OF CONTRACT (UNE-E)

25. Eschelon re-alleges the allegations contained above.

26. Qwest contracted with Eschelon, and Eschelon paid Qwest consideration of \$4 million, to automatically convert Eschelon's base of 49,000 resale lines to the UNE-E platform without disruption in service or functionality. Eschelon performed its obligations under the contract in all material respects. Qwest has engaged in a pattern of conduct that repeatedly has breached the contract by failing to provide the automated process, failing to convert Eschelon's resale customer base to the UNE-E platform, and failing to accurately bill Eschelon for UNE-E services. As a proximate result, Eschelon has not obtained the benefit of its bargain and has suffered damages (including incidental and consequential damages) in an amount to be proven at trial (but no less than the \$4 million consideration Eschelon paid Qwest to perform the automatic conversion).

THIRD CAUSE OF ACTION – BREACH OF CONTRACT (DSL)

27. Eschelon re-alleges the allegations contained above.

31. Qwest contracted with Eschelon, for valuable consideration, to make DSL service available for Eschelon to sell to its customers. Eschelon performed its obligations in all material respects. Qwest engaged in a pattern of conduct that repeatedly breached the contract by failing to provide the promised service. As a proximate result, Eschelon has suffered damages (including incidental and consequential damages) in an amount to be proven at trial but no less than the \$1.7 million in additional costs that Eschelon has incurred to obtain DSL service from a third party).

PRAYER FOR RELIEF

WHEREFORE, Eschelon prays for the following relief:

1. For actual, incidental, special, and consequential damages (in an amount to be proven at trial, but for purposes of this pleading, no less than \$7,188,000);
2. For prejudgment interest;
3. For all other such relief as the Court deems proper.

DATED this 16th day of June, 2003.

GRAHAM & DUNN PC

By _____

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Attorneys for Plaintiffs

April 18, 2003

BY U.S. MAIL

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Re: Request for Investigation and Process for Addressing Time Critical Issues

Dear Dr. Haar:

Eschelon Telecom, Inc. ("Eschelon"), asks the Minnesota Public Utilities Commission ("the Commission") to investigate the nature and extent of improper contacts between Qwest Wholesale and Qwest Retail, as well as other issues raised by a recent example of a customer-affecting conversion gone wrong. Eschelon also asks the Commission to address procedural processes and mechanisms for obtaining regulatory assistance when these time critical issues occur. Fifteen additional copies of this letter are enclosed for your convenience.

I. Improper Contacts Between Qwest Wholesale and Qwest Retail and Related Issues

In the example prompting this request,⁵¹ a Minnesota end-user customer signed a Letter of Authorization ("LOA") to switch carriers from Qwest to Eschelon. Eschelon initiated the process to convert the customer, including submitting a Local Service Request ("LSR") with an Eschelon desired due date of April 9, 2003. Qwest's processing of this request involved several errors and examples of improper conduct. Qwest's conduct raises questions that should be investigated, particularly with respect to the frequency with which the problems occur and the steps needed to correct them.

1. Qwest-caused outage when converting customer to another carrier.

First, almost *two weeks* before the LSR due date, on March 27, 2003, many of the customer's telephone numbers⁵² went out of service. Eschelon later learned that a Qwest wholesale typist made an error in the Qwest service order and brought the lines out of service two weeks early. Qwest has now agreed that it made this error. Naturally, the end user customer was upset about the unexpected outage.

2. Qwest misinformation about cause of outage.

Unfortunately, in these situations, it appears to the end user customer that the Competitive Local Exchange Carrier ("CLEC") is to blame, because the outage occurs after a request to switch carriers has been made. It is difficult enough for CLECs to deal with this general misimpression and explain such problems. In this case, Qwest worsened the situation by actually telling the customer that the outage was Eschelon's fault. Qwest told the customer that the service was disconnected at the request of Eschelon without disclosing Qwest's error in processing that request. Qwest had not used the due date that Eschelon requested on the LSR. Instead of admitting this, Qwest created a "he said, she said" situation that frustrated the customer.

⁵¹ With respect to this example, enclosed are the following Attachments: (1) Eschelon's April 3, 2002 urgent request for assistance; (2) Qwest reject notice; (3) Eschelon's April 17, 2003 email summarizing outstanding issues and attaching Qwest's root cause analysis emails; and (4) Qwest Retail email to Eschelon's end user customer.

⁵² The telephone numbers in the affected service orders consisted of two blocks of Direct Inward Dial ("DID") numbers.

Eschelon has also been told that a Qwest Retail representative/agent provided a letter to the customer indicating that the errors were caused by Eschelon. The customer does not want to get caught in the middle of this dispute and may even have been told by Qwest Retail not to share the information with Eschelon. Eschelon has asked Qwest for a copy of any such communication to the customer, but Qwest has not provided a copy.

3. Qwest rejection of Eschelon's customer-requested cancellation request and processing of Qwest's own cancellation order.

The end user customer was so upset about the outage that the customer asked Eschelon to cancel the LSR and stop the carrier switch. Eschelon submitted a request to cancel the earlier LSR. Qwest rejected Eschelon's supplemental request to cancel its earlier LSR. The Qwest rejection notice stated that Qwest could not complete Eschelon's cancellation request because Qwest had completed some of its service orders.⁵³ Despite this Qwest systems limitation, Qwest was telling Eschelon that it needed to cancel the LSR (and associated service orders).⁵⁴ Eschelon escalated the issue to obtain cancellation of the remainder of the service orders associated with the LSR. Qwest then told Eschelon that Eschelon's the remaining orders were already cancelled. Only Eschelon can cancel its own LSR/order. Qwest does not have the authority to cancel a CLEC's LSR/order. If Qwest did so, the CLEC could not control its own order process and the choice and timing of cancellation decisions. The problem is particularly serious if Qwest Retail cancelled the Eschelon order, because Qwest Retail should not be involved in the process at this point at all.

4. Qwest Retail's failure to refer CLEC customer to CLEC.

⁵³ See Att. 2 (reject notice stating: "One or more Service Orders completed. Unable to process cancellation supplemental").

⁵⁴ Eschelon submits one LSR for which Qwest may create multiple internal service orders.

It appears that Qwest Retail did cancel Eschelon's remaining orders. The customer told Eschelon that Qwest Retail informed the customer that it cancelled Eschelon's remaining orders but would re-issue the orders if Eschelon did not cancel its LSR per the customer's request.⁵⁵ Qwest Retail should not have been handling this issue for a CLEC customer. Qwest has now agreed that Qwest Retail should have referred this customer to Eschelon.

5. Qwest Wholesale communication to Qwest Retail about CLEC customer.

Unfortunately, this was not the only Qwest Retail communication with the CLEC customer. The other Qwest Retail communication to the customer resulted from a contact by Qwest Wholesale to Qwest Retail. Qwest Retail then sent an email directly to Eschelon's customer. In the email, the Qwest Retail representative specifically said:

"I was contacted by our wholesale group. . . ."

See Att. 4 (emphasis added). It cannot be disputed that the Qwest Wholesale to Qwest Retail communication occurred. All communications about this outage, caused during processing of a CLEC LSR to convert the customer to the CLEC, should have been occurring between Eschelon and Qwest Wholesale at this point. Nonetheless, Qwest Retail proceeded to report on the alleged status of the Eschelon orders to Eschelon's customer. Under no circumstances should Qwest Retail be initiating an email to convey

⁵⁵ See also Email from Qwest Retail to Eschelon's customer, discussed below.

wholesale information about the alleged status of a CLEC LSR directly to the CLEC's end user customer. Qwest Wholesale should have contacted Eschelon, so that Eschelon could have communicated any relevant information to its customer.

When CLECs hear of such Qwest Wholesale-Qwest Retail contacts, or believe based on a course of events that they have occurred, CLECs face a huge uphill battle in attempting to prove the conduct. Rarely are the contacts in writing or, if they are written, the customers do not want to be caught in the middle by providing copies to CLEC. Being able to prove the contact through an email provided to the CLEC is not likely to happen often. An investigation is needed into the circumstances under which such contacts occur and how to prevent them.

6. Qwest misinformation about Eschelon efforts to comply with customer's cancellation request.

In the improper Qwest Retail email to Eschelon's customer, Qwest Retail said the Qwest Wholesale group "advised that due to the fact that they have an ASR that has not been canceled by Eschelon that they have to reissue those orders due on 4-09. Eschelon HAS to cancel the ASR with our wholesale group or these orders will process." *See* Att. 4.⁵⁶ This Qwest statement suggests that Eschelon was not acting in good faith to abide by the customer's request and cancel the LSR. This created an impression with the customer that Eschelon was acting against the customer's expressed wishes and further angered the customer. Additionally, Qwest Retail's statement suggests that, if Eschelon does not correct its alleged failure and cancel the LSR, the customer's service will go down AGAIN because Qwest wholesale will have to "reissue" the conversion orders. Such a possibility would naturally deter a customer from switching carriers. In fact, however, as discussed above, Qwest prevented processing of Eschelon's cancellation request first through Qwest system limitations and then by Qwest's own actions in canceling the orders. Qwest's failure to disclose Qwest's role in preventing the Eschelon cancellation from processing mislead the customer. It appeared that Eschelon was not following process and deliberately acting against the customer's wishes, when Eschelon had followed the proper procedure to cancel the LSR.

To make matters worse, Qwest also suggested to the customer that restoring service took longer than necessary because of Eschelon's alleged failure to cancel the LSR. If restoring service took longer than necessary, however, the delay was due to Qwest's initial error in typing the service order incorrectly so that the order was processed two weeks early. When service orders complete, information about the office equipment (located in the switch; known as Line Equipment Number, "LEN") may be reassigned in the Qwest system. When this happens, the LEN is lost for this customer, and a new LEN must be obtained.

⁵⁶ Qwest Retail erroneously refers to the "LSR" as an "ASR."

If a CLEC LSR is canceled before the Qwest service order completes, the LEN is preserved and still available for this customer. If obtaining a new LEN resulted in a delay in restoring service, Qwest caused that delay by erroneously completing service orders long before the requested due date. Qwest's systems and its own cancellation of Eschelon's orders then prevented Eschelon from canceling the LSR. Attempting to explain the interaction of CLEC LSRs and Qwest service orders, including the manner in which LSRs are processed and what happens when service orders complete, to an end user customer is difficult and obviously leads to confusion. The customer simply remembers that Qwest said Eschelon's alleged failure to cancel the LSR caused a delay in restoration of service. This is not the case.

7. Qwest policy of not correcting its misinformation for customer.

As often happens in the "he said, she said" situation, the end user customer demanded that Eschelon provide a written statement from Qwest stating clearly that Qwest made the error causing the outage and that Eschelon had complied with the customer's wishes. Because Qwest had created doubt about Eschelon's explanation of the problem, the customer would not rely on Eschelon's statement alone and wanted confirmation from Qwest itself. Eschelon requested such a statement from Qwest. Qwest's senior service manager for Eschelon's account told Eschelon, as Qwest has done on other occasions, that Qwest's policy is that Qwest will not provide a written statement to be provided to the customer, even when the purpose of the statement is to correct Qwest misinformation.⁵⁷ Eschelon reiterated that it was not asking Qwest to contact the end user customer but wanted a written statement that Eschelon could use to meet the customer's demand. Qwest's senior service manager then said that, in this instance, she would provide a root cause analysis of the issue rather than a statement about cause of the errors.

Qwest's initial root cause analysis was written in a manner so convoluted that no ordinary customer would understand that the end result was an admission of Qwest error. It also did not address all of the issues raised by Eschelon. Since then, Qwest finally provided a more clear statement that the "Qwest SDC issued two orders assigning a due date of March 27, 2003 instead of the Eschelon requested due date of April 9, 2003." See Att. 3 (attaching Qwest email). While it does not refer to an error and does not address other issues, at least Eschelon may finally show the customer a Qwest statement that admits it assigned the wrong date (assuming the customer understands and accepts that "issued two orders assigning a due date" means creating two orders with incorrect dates). The length of time, and the amount of resources, that it has taken to obtain this partial response, however, is unacceptable. Eschelon's provisioning and carrier relations personnel and attorney have spent numerous hours on this issue and have had to make repeated requests to multiple representatives at Qwest about it. Eschelon identified this issue as "urgent" to Qwest on April 3, 2003. Qwest did not provide this response until April 16, 2003 – nearly two weeks later. Two weeks to get this information, particularly when it is needed to correct Qwest misinformation, is too long in a conversion situation. The end user customer's carrier selection is in the balance, and time is of the essence.

8. Qwest's use of Wholesale error as Retail Win-Back opportunity.

In this case, Eschelon still does not know if the customer will switch to Eschelon.

Although the customer previously chose Eschelon and authorized the switch, Qwest's

⁵⁷ Qwest also attempted to divert the issue by claiming that Eschelon did not have an LOA for this conversion. Eschelon had to provide a copy of the LOA to Qwest to get the discussion back on track. Eschelon informed Qwest that, even assuming there was no LOA (which was NOT the case), other remedies are available to address slamming and related issues. LOA-type issues cannot be used as a license to allow Qwest Wholesale and Retail to engage in improper contacts, Qwest to cancel CLEC orders, Qwest to convey misinformation to the CLEC customer, etc.

Wholesale and Retail divisions have acted together to change that result. Now, Qwest is using this situation as a win-back opportunity.

The Commission should investigate these issues and the frequency with which they occur. In Minnesota's 271 investigation, the Administrative Law Judge ("ALJ") has already found that AT&T presented credible evidence supporting a finding that individual employees have made *ad hoc* efforts intended to convince customers to remain with Qwest.⁵⁸ Eschelon's example provides more recent corroboration that such conduct occurs, even after Qwest has allegedly re-trained its personnel on the rules. This suggests that the behavior is not *ad hoc*. The Commission should determine whether Qwest has a policy (directly or indirectly) of allowing such conduct or otherwise condoning (expressly or implicitly) such conduct. When considering the nature and extent of CLEC examples of such conduct in making this determination, the Commission should consider the evidentiary obstacles faced by CLECs. It is difficult for CLECs to prove and quantify such issues because the communications are usually oral and, by their nature, occur between Qwest and the customer and thus are not visible to CLECs. Regulators have more authority and ability to gain visibility into what is actually occurring within Qwest than CLECs have on their own.

The ALJ indicated that the Federal Communications Commission ("FCC") has found that "the appropriate fora for such allegations are proceedings before state commissions."⁵⁹ The Minnesota commission should investigate the issues raised here.

I. Regulatory Process for Assistance With Time Critical Issues

Eschelon also asks the Commission to address procedural processes and mechanisms for obtaining regulatory assistance when these time critical issues occur. When examples such as the one described here occur, immediate assistance is needed. A formal complaint has many drawbacks in such a situation. Time and resources are among the largest drawbacks. Also, in this example, Eschelon needed some discrete items immediately to attempt to satisfy the customer, such as a clear statement from Qwest that it made the error that caused the outage and that the information Qwest provided to the customer was erroneous. While the legal ramifications and remedies of the incident may be worked out later in formal complaints, a complaint is not always the best method of addressing such immediate needs.

Eschelon did turn to the Minnesota Department of Commerce ("DOC") for assistance with respect to this situation. Eschelon commends the DOC for its efforts to work with both parties to assist in obtaining needed information. Earlier, when attempting to obtain the information directly from Qwest, Eschelon told Qwest that it would be contacting the DOC and PUC. Eschelon believes that invoking the state agencies assisted in getting the partial answer that Qwest finally provided. More is needed with respect to this particular issue (*see* #2-#7 in Att. 3), and there are the larger implications of this example that should be investigated.

Eschelon would welcome the opportunity to participate in discussions about mechanisms that could be put in place or formalized for regulators to help address such issues. An informal process, based on letters and even oral complaints, already exists for end user customers. Eschelon inquired about that process in this situation but learned that it does not necessarily apply to carrier-to-carrier issues. Perhaps some kind of parallel informal carrier-to-carrier process, with a known point of contact, could be established. Another possibility would be Commissioner or staff intervention. In one situation in which I

⁵⁸ Findings of Fact, Conclusions of Law and Recommendations, Office of Administrative Hearings, *In re. Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1, 2, 4, 5, 6, 11, 13, and 14*, 7-2500-14486-2, MN PUC Docket No. P-421/CI-01-1371 (Jan. 24, 2003) ("Minnesota ALJ Order") at p. 103, ¶ 345.

⁵⁹ *Id.* at p. 103, ¶ 346.

was involved on behalf of a former client some time ago, Commissioner Scott asked the CLEC and Qwest to meet with him to discuss a conversion that had gone bad. His intervention led to an exchange of information at a level and in a timeframe that CLECs on their own often are not able to obtain, and it hastened bringing the matter to a conclusion. These processes would not replace formal complaints (unless otherwise agreed by the parties) but would provide some means to address the time critical issues earlier. Often, doing so is a function of getting the attention of the right people at the right level to address the issue and provide needed information. Regulators are in a better position to obtain this result than CLECs.

Eschelon encourages the Commission to initiate such discussions. We appreciate your attention to this matter.

Sincerely,

Karen L. Clauson
Senior Director of Interconnection
Eschelon Telecom, Inc.
612.436.6026

cc: J. Jeffery Oxley, Eschelon
Jason Topp, Qwest
JoAnn Hanson, Qwest
Department of Commerce
Attached Service List



To: Teresa Taylor, Vice President of Wholesale Markets - Qwest

From: Rick Smith, CEO – Eschelon Telecom

Date: August 21, 2003

Re: Recent Service Outages

I am writing to bring to your attention some very serious service issues. In the last week, Eschelon has endured two network outages that interrupted service to large numbers of Eschelon customers. The D.C. power to our equipment collocated in the Denver Southwest C.O. was disrupted on August 20th and the Megacentral DS3 connection (supporting our jointly provided DSL service in MN) was down for over four hours in the middle of the afternoon on Friday, August 17th. In both cases, the outages were caused by an interruption of the services provided by Qwest and only Eschelon customers experienced service disruptions. Both outages were beyond the ordinary in severity and impact.

Qwest would never tolerate a technician accidentally (or worse yet, purposefully) removing power from one of its central offices. Yet, in the last three years, Eschelon has suffered this fate on three different occasions, most recently on August 20th. This is clearly intolerable.

Neither recent outage was caused by equipment failure or any natural cause. Human interference with our operations is the only possible cause, a conclusion Qwest shares as evidenced by the fact that Qwest personnel directed us to refer one of these incidents to Qwest security.

Perhaps more disturbing than the fact that persons unknown to us are sabotaging our operations is that fact that in both cases the Qwest account service team was unable to either solve the outages or to escalate the issues to personnel who could do so. Nor can the Qwest service team provide any reason, rationale, or root cause for either outage.

Qwest strictly regulates and controls what Eschelon may do within Qwest's premises, but Qwest appears to tolerate negligent or intentional interference with Eschelon's operations which results in outages that Qwest is unable to resolve or explain. This is completely unacceptable. Were Qwest's own customers affected by negligent or willful misconduct, Qwest would surely investigate and take steps to put an end to it.

Qwest appears to be operating its network without basic alarm and test capabilities. I say this because Eschelon consistently endures multiple Qwest-related major outages every month. We define a major outage as outage experienced by multiple customers or two or more T1 failures do to a commonly caused network event. Fourteen such failures occurred in February and 11 failures in July. Failures of DS3 circuits, tandem switch problems, and power failures have occurred in the Qwest network throughout our years of operation. Eschelon has network operations too and we understand that network elements go into trouble periodically. However, Eschelon maintains vigilant alarming and test capability on its network to detect and restore trouble before customers are aware of it. I challenge you to explain why the network services provided to Eschelon seem to fail so regularly and why Qwest is unaware of the failure until Eschelon calls.

The attached pages detail each of the most recent failures. I ask you to conduct an internal investigation to determine why such poor service is being delivered to one of your largest wholesale accounts. These

“mystery” outages must cease immediately. You should be aware that there have been numerous circumstances over the last three to four years where Eschelon’s customers have suffered from outages that have never been explained. On only one of these occasions has Qwest reported to Eschelon that it had disciplined its employees for willful disruption of Eschelon services. And, even on this occasion, Qwest initially reported the problem “No Trouble Found (NTF).” Similar events have occurred all too often for us not to strongly suspect that some Qwest employees are negligently or intentionally sabotaging Eschelon’s operations. We ask that Qwest management undertake a thorough investigation of these recent events. I urge you to take this matter seriously. None of us can tolerate the black-eye that develops when network reliability comes into question.

8-20-03 - Wednesday

Denver Southwest Central Office – DNVERCOSW

II. Power disrupted to Collocation - Approx. 450 analog & IDSL lines impacted

Duration – 2 hrs.

09:57 a.m. central - Eschelon loses all visibility to its DLC Collo equipment in this office. Eschelon immediately diagnoses and dispatches a technician to the Denver SW office. Upon arrival at the site Eschelon techs finds that the Bussman GMT fuse covers on the Qwest BDFB serving Eschelon are gone and all circuit breakers (inside our cage) that feed our DLC gear are blown. Although the main fuses in the BDFB were in place, the fuse covers were not in place. Upon resetting the breakers, Eschelon’s equipment begins going through its power-up reload procedure. 2 hrs. pass before service is restored due to dispatch time and cold restart time for the Eschelon equipment. The cause of the outage is determined to be a complete loss of both redundant power feeds (A&B) and subsequent current spike related to restoral of power.

Eschelon observed another collocater cage (AT Link) being installed near the Eschelon cage. The fuse positions for AT link are directly above the Eschelon A&B fuse positions on the BDFB. The AT link fuses were placed in a “ready position” in plastic holders (as if ready to do power work). The Eschelon fuse positions are clearly labeled as “Electro-Tel”, Eschelon’s name at the time that the cage was ordered. See the attached photos.

Given the state of our circuit breakers and the fact that the BDFB main fuse GMT covers were removed, we suspect that someone pulled our fuses and then quickly replaced them. (They pulled Eschelon A & B fuses and then put them back in causing a power spike which tripped all 4 circuit breakers serving our equipment). Removal of both power feeds caused a complete disruption of our service and forced our equipment to go through a cold reboot. Since only Qwest personnel are allowed to access fuses on the BDFB, we can only surmise that a Qwest employee was involved.

The Eschelon tech talked to three Qwest techs who were present in the C.O. when he arrived and all three denied knowing what happened and advised calling Qwest security. Eschelon management has requested a Qwest security investigation via a call to Jean Novak. Eschelon management has since called Qwest security directly as well. Qwest security called back late in the afternoon on 8/20 to advise that they do show a card swipe entry less than 20 minutes prior to our power disruption.

This appears similar to two other incidents that occurred in 2001. At the Bloomington South Central Office in Bloomington, MN (1/9/01). a Qwest tech pulled the wrong fuses and cut off power to the Eschelon Collocation gear as well. To our knowledge that technician was never disciplined. Additionally in the Bellevue, WA (3/15/01) central office, a Qwest tech pulled the active fuses supplying power to our collocation equipment, again resulting in a complete reboot of Eschelon’s equipment.

8-15-03 - Friday

III. Minneapolis Downtown Central Office – Qwest trouble ticket 2459192

Megacentral DS3 service is down – Approx. 674 Eschelon ADSL customers out of service in MN.

Duration – 4 hrs. 40 min.

Eschelon resells Qwest DSL. Qwest aggregates all the DSL transport and delivers the DSL customers to Eschelon via a DS3 connection service known as a “Megacentral” in each major Qwest city. This service is ordered through the Qwest Enterprise Group.

Below are the events and calls that took place from 11:17 am CST until facility was fully restored at 15:57 CST. Total outage duration – in excess of 4 hrs. 40 min.

11:17 central - Eschelon personnel notice that multiple customers have called to report that DSL is not working. Eschelon personnel diagnose and determine that no DSL traffic is coming from Qwest on the Megacentral connection. DS3 circuit runs from Qwest downtown Minneapolis C.O. on 5th street to the Northstar Bldg. On 7th St. (total of 2 blocks).

11:39 central – Eschelon calls Qwest to report outage. Ticket number 2459192 is issued. Qwest was not aware of outage and indicates no alarming on circuit.

11:45 central - Eschelon engaged with Qwest Enterprise group to isolate and repair, Qwest provided no reason for outage at this time.

12:27 central – Eschelon is informed by Qwest Enterprise Group that a Qwest tech had been dispatched to a location not provided to us with no ETA.

12:34 central - Eschelon contacts Jean Novak – Qwest Sr. Svc. Mgr. to escalate as a major service outage. J. Novak has no information. Continued to work issue and call Qwest repair for status, receive little information.

12:52 central – Eschelon communicates to Jean Novak via voice mail we were not getting LOSS OF FRAME – LOSS OF SIGNAL and what appeared to be the trouble was not the DS-3 but the ATM layer of the connection.

13:07 central – Eschelon receives an update from Qwest Repair that a tech was dispatched to CO first and has seen no problem there and is now preparing to go to the North Star Bldg. POP.

13:31 central - Eschelon logged a LOS and LOF (Loss of signal – Loss of frame) and went into yellow alarm. The DS-3 facility appeared to be down hard. This would be expected when work and testing being done at C.O.

13:45 central - Qwest Tech Judy is in fiber room at Northstar Bldg. able to loop Eschelon Equipment and Eschelon cleared. Looping is visible on Eschelon Shasta logs. Judy (Qwest Tech) requested loop from CO and was told that the C.O. techs had not cleared the CO yet and had identified a problem in their MUX at CO and were currently engaged with Nortel to resolve. Judy packed up and left at approx. 14:00.

14:10 central - Eschelon Ops Manager John Ward dispatched to the downtown C.O. to attempt to identify issues and speak to individuals working issue. When he arrived at downtown C.O. he attempted to locate someone working on the trouble with no luck. John visited the Security desk on the main level attempting to locate Qwest CO manager, whom he was told was unavailable. It appeared that no one was working the issue!

14:46 central - Eschelon is told by Jean Novak - Qwest dispatched Tier Two support to work issue on MUX at CO. John Ward left the Qwest central office and returned to Eschelon office

15:36 central - Eschelon contacted Cindy Ohs high cap manager to try to identify what was occurring since not information on progress was forthcoming. Cindy indicated that they had Nortel on line and had un-provisioned and re-provisioned everything and they are now seeing blue alarm toward them and were not able to clear facility and were re-dispatching to North Star because they had Blue alarm.

Eschelon personnel ask if anyone has tried reversing transmit & receive on the facility – Grasping at straws at this point since Qwest was not making any progress. Eschelon techs indicate that they had not done this, but would go down and attempt.

15:57 central - Eschelon techs reversed transmit & receive on the DS3 COAX cable in the Eschelon suite in the Northstar bldg. Immediately the facility came back up.

16:00 central - Eschelon notifies Qwest not to touch the circuit.

Eschelon is concerned that Qwest technicians were back and forth over a 4 hr. period between the downtown C.O. and the Northstar bldg. multiple times and could not clear what appears to be a simple reversal of transmit & receive. This reversal should never have happened in the first place. Additionally Eschelon observed minimal awareness of the problem on the part of Qwest personnel and little interest in resolving it.



August 26, 2003

William Mundell, Commissioner
Arizona Corporation Commission
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Re: Docket No. T-00000A-97-0238, Qwest's 271 Application

Dear Commissioner Mundell:

I have been advised by the Commission Staff that during the open meeting held August 21, 2003, you asked if anyone knew of any problems that had arisen with Qwest Corporation's ("Qwest") operation support systems ("OSS") in other states since its 271 applications were approved.

MCI's overall mass market (consumer) local exchange carrier ("LEC") reject rate for orders submitted was 15.4% for all Bell operating companies combined for the week ended August 15, 2003. The Qwest reject rate dropped below 30% for the first time that week to 28.4%. The overall small business market LEC reject rate was at 41.3%. The Qwest reject rate for small business orders was 40.7%. Below is a summary of our most recent experiences with Qwest's OSS and OSS documentation that impacts rejection of our orders in Qwest's OSS.

1. Intermediated Access ("IMA") is the method provided by Qwest for CLECs to access Qwest's OSS and process local orders. IMA solely impacts CLECs ordering practices and is not used by Qwest's retail side of its business. The current Change Management Process ("CMP") document lacks sufficient language to require that within specific timeframes Qwest correct software defects when the defect impacts CLECs' abilities to process local service requests ("LSRs"). Without such language, CLECs have no guarantees from Qwest that software defects will be fixed in a timely manner. A defect in the software means the system is not working in accordance with Qwest's published business rules. In turn, when a defect is identified, it is inappropriate for Qwest to simply update the document accordingly because it then places the burden on CLECs to adjust coding they implemented based on the prior documented business rules. In April 2003, MCI initiated a change request through CMP to provide such language that will be subject to a unanimous vote. It is anticipated that Qwest will reject the change request based upon attempts to negotiate a resolution through the CMPO process.

2. Qwest must synch up system edits with those being performed manually by their Interconnect Service Center ("ISC") personnel. Qwest implemented a system change request that would allow migration order types (UNE-P migrations) to be processed by entering the telephone number and house number only. The intent of the "migrate by TN" change request was that less information would be required on the order than was required prior to the change that would result in less rejects for CLECs. After implementation, MCI saw a significant increase in migration order manual rejects and noted that the ISC personnel were editing more than what was required. A process change was implemented by Qwest after MCI provided examples of the out of synch condition between systems/manual processing of LSRs. A process must be established by Qwest to synch up system and manual edit processing. Qwest has agreed that the process is necessary, but there is no formal commitment to begin.

3. When Qwest implemented what was expected to be Industry Standard "migrate as specified" ordering requirements, it neglected to provide "end-state" view requirements for features that drive blocking and hunting requests. In accordance with a Z-tel change request, Z-Tel requested "the ability to migrate customers as specified without having to list changes to the customer's current feature set." Qwest continues to require a distinction be made between what exists and what is changing for blocking and hunting features.

4. When Qwest system edits are not documented or documented incorrectly, CLEC local orders are either rejected and/or incorrectly provisioned. MCI recently discovered a Qwest back-end system edit that is attempting to validate complete address information that is not required under Qwest published business rules. The edit requires address information be an exact match to what is listed in Qwest PREMIS database and can be retrieved via a preorder service address validation ("SAV") query. Not only are the address fields not supposed to be edited, but CLECs are not and should not be required to perform an SAV preorder query because it increases order processing timeframes. Moreover, an update to documentation would place the burden on CLECs to make system changes to accommodate what should have been documented correctly in the first place.

Another significant issue that can result when documentation is not adequately reflecting how the system is working is requested end user services are not provisioned. Qwest recently determined that blocking features are required to be provided in alphabetical order because that is how the system "expects" blocking features. If blocking features are not provided in alphabetical order, Qwest may only provision those that are provided for in alphabetical order, thus an out of synch condition may exist between what was requested and what Qwest provisioned. At this time the impact of this problem is unknown but Qwest was requested to provide analysis between LSR requests and Service Orders provisioned to determine the impact.

5. Qwest cannot provide to CLECs the most current customer service record ("CSR") because it maintains retail CSRs as "live" until the end user's bill is rendered, paid and posted to Qwest billing system. When a CLEC migrates a local customer,

Qwest houses two active customer service records. One with Qwest retail information and one that is generated for the CLEC when the customer migrates. The IMA system determines which CSR is valid per order by the use of a customer code identifier internally tracked by Qwest. If the CLEC is requested by the end-user to change and/or correct what was provisioned, CLECs must distinguish which CSR is the customers and provide the valid customer code or the order will reject. MCI initiated a change request to eliminate multiple match conditions (SCR102202-01 - Customer Service Record) on October 22, 2002. While Qwest implemented changes to reduce multiple CSR scenarios, it did not address the intent of the original request which referenced the largest impact to CLECs. That is post migration when CLECs are most impacted by multiple CSR conditions 100% of the time until Qwest rendered, billed and posted the retail end user's final bill. Thus, MCI continues to see a large volume of rejects that are a result of multiple match CSR conditions.

A copy of this letter is being docketed and sent to all parties on the service list and being e-mailed to parties as well.

Sincerely yours,

Thomas F. Dixon